82-1173
No.

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

OPE SHIPPING, LTD., and EL PORVENIR SHIPPING COMPANY, Inc., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

VADOR SHIPPING, LTD., and CIA DE NAVEGACION LA LIBERTAD, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

AGUA SHIPPING, LTD., and CIA DE NAVEGACION CORINTO, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

DURAS SHIPPING, LTD., and MARINA MERCANTE NICARAGUENSE, S.A., et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED:

(1) Whether the violent taking by Sandinista crew elements of four Nicaraguan flag vessels, privately owned by Somoza, to ports in Cuba and Panama where they were detained by the Cuban and Panamanian authorities pending overthrow of the Somoza regime, and subsequently returned by Cuba and Panama to Nicaragua after establishment of the new Nicaraguan government on July 19, 1979 constituted "capture, seizure, arrest, restraint, detainment or confiscation by the government of the country in which the vessel is owned or registered" within the exclusionary language of the American Institute War Risk Clauses.

(2) Whether the subsequent retention of the vessels by the legitimate Sandinista government constituted retroactive validation of the previous actions taken with respect to the four vessels by the Sandinistas as a rebel government within the exclusionary language of the American Institute War Risk Clauses.

(3) Whether the marine insurance community is entitled to a definitive interpretation of the War Risk exclusionary language at bar for precedential guidelines in future cases and for complete harmony between American and English courts on the interpretation of that language.

LIST OF PARTIES:

The Petitioners have no parent companies, subsidiaries or affiliates, because Petitioners are individual Underwriters at Lloyd's appearing in suit under the representative name of Edward Alan Hermitage and all other Underwriters at Lloyds's, subscribing policy of War Risk Insurance No. 01/145005 through Messrs. Robt. Bradford Hobbs Savill, Ltd.

The only other parties in the proceedings before the United States Court of Appeals for the Second Circuit whose names are not listed in the caption were the Marine Risk Underwriters, Allstate Insurance Company, Inc., United States Fidelity and Guarantee Companies, Inc., and various British Underwriters who are not parties to the Petitioner herein because their dismissal below was affirmed by the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, War Risk Underwriters at Lloyd's, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW:

The opinion of the court of appeals (App.A infra. page A-1) was reported at 687 F. 2d 639. The opinion of the district court (App.B infra. page A-10) is reported at 521 F. Supp. 342.

JURISDICTION:

The judgment of the court of appeals was entered on August 30, 1982; a petition for rehearing was denied on November 5, 1982 (App. C infra. page A-26); a motion to file a second petition for rehearing was denied on December 14, 1982; and a motion to stay the mandate pending petition for certiorari was granted on December 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT:

The undisputed facts as found by both the trial and appellate courts involved four small cargo vessels, the EL SALVADOR, HOPE, and MANAGUA, owned by Panamanian corporations, and the HONDURAS, owned by Mamenic Line, a Nicaraguan Corporation, with the three Panamanian owned vessels all under long-term bareboat charter to Mamenic, and with the four vessels registered under the Nicaraguan flag. The four owning Panamanian and Nicaraguan corporations were all owned or controlled by the Somoza family. The four vessels valued at $1,000,000 each, were insured for Marine (Hull and Machinery) Risks with American Underwriters at Lloyd's (75%) and British Underwriters (25%), and for War Risks with Underwriters at Lloyd's (100%); and both policies were effective from May 15, 1979 to May 15, 1980.

On June 17, 1979 the Master of the HOPE was forced by armed Sandinista crewmembers to sail the vessel to Cuba where it was taken under control by the Cuban authorities. On June 22, 1979, the EL SALVADOR and HONDURAS were removed by armed Sandinista crewmembers from anchorage in the Canal Zone to Panamanian waters where the vessels were taken under control by the Panamanian Maritime National Guard, with the MANAGUA also taken by its crew from El Salvador to Panama. The four vessels were irrevocably lost to their owners as of June 17-22, 1979 because neither Cuba nor Panama would return the vessels because of their connection with Somoza.

By letters of June 24th and 28th, 1979 (App. D infra. pages A-28-29) General Somoza, as President of Mamenic Line, confirmed to his business associate Joseph Baittiner that the vessels had been seized and taken to Cuba and Panama, and he also confirmed previous verbal instructions that Mr. Baittiner take all necessary steps to protect all owned and chartered vessels including, *inter alia*, transferring the vessels to new corporations and new flags. On July 9, 1982 by a series of various corporate transactions, the vessel ownership purportedly was transferred from the former Panamanian and Nicaraguan corporations to newly formed Cayman Island corporations, and the vessels' registry under the Nicaraguan flag purportedly was cancelled. On July 13, 1979 the vessels were registered under the British flag in the Cayman Islands.

The historical facts established that Nicaragua had been engaged in civil strife through most of 1978 during which the Sandinistas were attempting to overthrow the Somoza regime, and that on June 7, 1979 General Somoza had declared Nicaragua to be in a state of seige. On June 18, 1979 the Sandinistas named a provisional government of five leaders (junta) which was recognized on June 22, 1979 by Panama; and on July 5, 1979 Somoza agreed to resign, and eventually fled the country on July 18, 1979. The Sandinistas took complete control of Nicaragua on July 20, 1979 and, on that same day, expropriated the entire business empire of Somoza.

The vessels were returned to Nicaragua by Cuba and Panama in August, 1979 after the Sandinistas had gained complete con-

trol of the Nicaraguan government. On September 28, 1979 the former Panamanian and Nicaraguan owners and the new Cayman Island owners instituted suit in the United States District Court for the Southern District of New York on alternative causes of action against the Marine Risk Underwriters and the War Risk Underwriters seeking to recover $1,000,000 for each of the four vessels. Nicaragua subsequently sold the vessels during 1980 to offset accrued port charges through condemnation proceedings instituted against the vessels and against the Cayman Island corporations as owners.

As evidenced by the caption of this case, separate suits were instituted on each of the four vessels in the name of the former owning corporations, and also the newly formed Cayman Island corporations, all as parties plaintiff, with each Complaint alleging the same alternative causes of action i. e. the loss was due to barratry of the crew, a covered peril under the Marine Risk (Hull) policy; or if not due to barratry, the loss must have resulted from a peril otherwise covered under the War Risk policy. The Marine Risk Underwriters asserted as complete defenses that the loss resulted (1) from the civil war in Nicaragua within the exclusionary language of the War, Strikes and Related Exclusions Clause of the American Institute Hull Clauses; and (2) from the assured's failure to take affirmative steps towards recovering the vessels in violation of their policy obligation under the Sue and Labor Clause.

War Risk Underwriters asserted as a complete defense that the loss resulted from capture, seizure, arrest, restraint, detainment, or confiscation by the country in which the vessels were owned or registered within the scope of Exclusion f of the American Institute Hull War Risks and Strikes Clauses. (App. E infra.)

The case proceeded to a bench trial before Judge Milton Pollack on June 2, 1981 but the prime movers in the corporate transactions, General Somoza and Mr. Joseph Baittiner, had been assassinated during September, 1980. In lieu thereof, the respondents produced Mr. Renaldy Guttierrez, an expatriate Nicaraguan lawyer residing in Miami, affiliated with the Somoza

family and subsequently appointed to succeed the late Mr. Baittiner as President of the plaintiff's Cayman Island corporations; and Truman A. Skinner, Esq., a Miami attorney who represented the Somoza interests in the former Panamanian and Nicaraguan owning corporations in the July 9, 1979 transactions transferring the vessels to the Cayman Island corporations. Respondents also produced a Mr. Fausto Amador, a Nicaraguan expatriate residing in Costa Rica, who had acted as Manager of Mamenic Line which owned the HONDURAS and operated the other vessels under long-term bareboat charters.

During trial, respondents offered into evidence copy of the July 20, 1979 Confiscation Decree (App.F, infra page A-34) which was authenticated by the testimony of Mr. Guttierrez as a former practicing Nicaraguan lawyer solely to establish that the vessels were irrevocably lost to the owners. The defendant Marine Risk Underwriters offered into evidence copies of Condemnation Proceedings instituted by Nicaragua in 1980 against the vessels as authenticated by the testimony of Dr. Francisco Ortega, a practicing Nicaraguan lawyer. The thrust of his testimony was to establish that the proceedings were given proper publication notice in the official Nicaraguan newspaper so that the Cayman Island owners had opportunity to reclaim the vessels.

To ascertain the true facts at trial, Judge Pollack personally examined Messrs. Guttierrez and Skinner at great length. Both witnesses also were practicing lawyers who separately represented the buyers and sellers in the transactions wherein each vessel was sold allegedly for an outright cash payment of $500,000 but neither witness saw any transfer of cash, although it would have amounted to $2,000,000 overall. Defendants stressed the issue of non-payment at trial because, although in the pre-trial stages for almost two years from September, 1979, the respondents never produced any indicia of payment or receipt of payment, despite outstanding discovery notices.

On August 31, 1981, Judge Pollack handed down a nineteen page Findings and Opinion, dismissing the Complaints and entering judgment in favor of the petitioners. Judge Pollack

held that the loss resulted from the ongoing civil war, and not from barratry, to deny coverage under the Marine Risk policy; and that the loss resulted from confiscation by Nicaragua in July, 1979, a peril excepted under the War Risk policy. He also held that the purported transfers in July, 1979 were a sham, which was ineffective even by its own devices because the cancellation of the bareboat charters to Mamenic was never established, so that Mamenic, as nationalized by the Sandinista government, would have retained the lawful right to possession of the vessels.

Respondents noticed an appeal to the Court of Appeals for the Second Circuit which eventually was argued on February 22, 1982. The respondents' argument was devoted primarily against the holding that civil war rather than barratry, was the proximate cause of loss; and secondarily against the holding that the loss was a result of confiscation by Nicaragua. On August 30, 1982, the Second Circuit handed down a thirteen page opinion affirming the District Court with respect to Marine Risk Underwriters but reversing with respect to petitioners.

The Second Circuit based its reversal primarily on the fact that the EL SALVADOR, HOPE and MANAGUA were owned by Panamanian corporations and that the District Court was not warranted in piercing those corporate veils, so as to place ownership of the vessels in Somoza and thus in Nicaragua. The Second Circuit also set aside the trial court's findings with respect to the sham transactions but instead found that the registry of all vessels was cancelled by Nicaragua on July 9, 1979, so that Nicaragua was not the country of registry with respect to any confiscation or detainment which occurred after that date. The Second Circuit made no specific finding of fact or conclusion of law with respect to the HONDURAS, which was owned by Mamenic Line, a Nicaraguan corporation.

The Second Circuit also found that the confiscation by Nicaragua was not proven so as to ratify *nunc pro tunc* the earlier taking by the crews and the detainments by Panama and Cuba because the record did not indicate that the Attorney General ever issued a confiscation order pursuant to the July 20, 1979 Decree. The petitioners had argued on appeal that (1) the Con-

fiscation Decree was offered into evidence by the plaintiffs solely to establish that their vessels had in fact been confiscated; (2) the Decree did not require the Attorney General to issue specific condemnation orders but was blanket authority to confiscate all Somoza assets; and (3) in any event, the vessels had already been confiscated as of June 17-22, 1979.

In rejecting confiscation as the cause of loss, the Second Circuit also relied substantially on the Sue and Labor argument i. e. if Nicaragua sold the vessels in 1980 under the names of the Cayman Island corporations as owners, Nicaragua could not have "confiscated" the vessels on June 17-22, 1979 (taking by the crews) or on July 20, 1979 (Confiscation Decree). The record clearly establishes that the Sue and Labor argument was advanced at trial and on appeal solely by the Marine Risk Underwriters, and never by the petitioners as alleged by the Second Circuit as a ground for reversal. Obviously, by erroneously attributing the Sue and Labor argument on appeal to the War Risk Underwriters, the Second Circuit completely failed to grasp the basic issues presented by the appeal or even to review the arguments set forth in the respective Appellee Briefs.

On September 13, 1982 petitioners filed a Petition for Rehearing which cited seventeen specific instances wherein the Court had overlooked or misapprehended the legal significance of its own findings of fact, e. g. the vessels were still under the Nicaraguan flag when "captured" or "commandeered" by the crews; respondents unsuccessfully petitioned Panama for return of the three vessels "detained" there; and the EL SALVADOR and MANAGUA were owned by Panamanian corporations when "detained" by Panama. We pointed out that the Second Circuit had failed to exercise appellate review as to the other excepted causes of loss, i. e. capture, seizure, arrest, restraint or detainment, although such review surely was dictated by the precise language used by the Court to describe what had happened to the vessels.

Indeed, by virtue of its own precise language categorizing the vessels as "detained" by Panama, we specifically requested the Second Circuit for a rehearing to reassess its entire position with

respect to the proper interpretation of the American Institute War Risk Clauses, or at the very least, to revoke its remand instructions with respect to the two Panamanian owned vessels detained by Panama. The Petition was denied without comment on November 5th, 1982 but because of the manifest injustice inflicted on petitioners with respect to the two Panamanian owned vessels, we filed a second Petition for Rehearing on November 24, 1982, which was denied, also without comment, on December 14th, 1982.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:

The jurisdiction of the District Court was invoked because of the admiralty and maritime nature of the claims being asserted by the respondents against Underwriters on policies of marine insurance.

REASONS FOR GRANTING THE PETITION:

The case presents important questions concerning the proper interpretation of the American Institute War Risk Clauses which include the insuring language at bar that has been a recurring subject of litigation in the American and English Courts for over two centuries due to the ever widening scope, and consequent rippling effect of official and quasi-official hostilities throughout the world. The case is of further importance because it directly impacts on the ever delicate question of conflicting de jure and de facto governmental rights in civil war situations and the proper approach of our Courts thereto. At this point in time, the case is of paramount importance because the same situation, foreshadowed by Nicaragua, now is clearly emerging in El Salvador, Guatemala, and Honduras, all of which dictate the highest juridical review of the American Institute policy language at bar.

As hereinafter discussed, petitioners submit that by reversing the District Court on the single issue of "confiscation", the

Second Circuit not only violated its own standard but also directly contradicted this Court, as well as other circuits, with respect to the proper extent and application of admiralty de novo review. It further misinterpreted prior holdings of this Court with respect to the proper application of the act of state doctrine; and also violated its own rules for piercing the corporate veil. Lastly, by ignoring the conclusion of the District Court as to the conflicting de jure and de facto governmental rights with respect to captured property, the Second Circuit rejected the English law cited by the District Court to support that conclusion.

(1) IMPROPER DE NOVO REVIEW

This admiralty cause was tried before an experienced trial Judge who concluded that the corporate transactions were a sham and that the vessels had already been taken from Somoza's possession by the Sandinistas when the attempted transfers were made. These conclusions, were based on the Judge's personal examination of the plaintiff's witnesses and his reasoned evaluation of their testimony. We emphasize that this was trial testimony, not deposition testimony, so any appellate attempt to overrule or ignore the Trial Court's conclusions, unless clearly erroneous, was an abuse of admiralty de novo jurisdiction (if it still exists), *McAllister v United States*, 348 U.S. 19, 20, 75 S.Ct. 6,8 (1954); *Petterson Lighterage & Towing Corporation v New York Central R.Co.*, 126 F.2d 992, 995 (2d Cir. 1942); *Crist v United States War Shipping Administration*, 163 F.2d 145, 146 (3rd Cir. 1947).

That the District Court's conclusions were not erroneous, clearly or otherwise, is more than amply demonstrated by the Second Circuit's insistence on ignoring the historical reality that General Somoza in addition to controlling Nicaragua, also controlled substantial commercial holdings; *Productos Carnic S.A. v Central American Beef and Seafood Trading Co.*, 621 F.2d 683, 685 (5th Cir. 1980). Apart from ignoring historical reality, the Second Circuit also ignored its own most recent criteria for

piercing the corporate veil in admiralty cases as earlier posited in *Kirno Hill Corp. v Holt*, 618 F.2d 982 (2d Cir. 1980) at page 985:

> "The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: Holt must have used Waterside-Pennsylvania to perpetrate a fraud or have so dominated and disregarded Waterside-Pennsylvania's corporate form that Waterside-Pennsylvania primarily transacted Holt's personal business rather than its own corporate business." (Citations omitted).

In essence, the Second Circuit's reversal was based solely on not piercing the corporate veil because, on its reasoning, if the veil could not be pierced, the July 9, 1979, transactions as to ownership and title were valid, so Nicaragua could not have been the country of ownership or registry on July 20, 1979, the date of the Confiscation Decree. To bolster its reasoning, the Second Circuit posited the absence of fraud as the basis for overruling the District Court but, in so doing, it contradicted its above quoted alternative standard for piercing the corporate veil i.e. there either must be fraud, *or* there must be complete domination. The District Court, based on its personal examination and evaluation of trial testimony, clearly found that Somoza completely dominated both the former Panamanian and Nicaraguan companies, as well as the newly formed Cayman Island corporations, which conclusion generally was in accord with the Fifth Circuit in *Carnic* (supra), and also with the Sandinistas in the Confiscation Decree.

Apart from reversing on the absence of fraud, the Second Circuit also ignored completely the District Court's finding that the vessels already had been taken from Somoza's possession before the July 9, 1979, attempt to transfer title and registry, which finding immediately raised two inevitable but obvious conclusions. Somoza had lost the vessels on June 17-22, 1979, so he had no title or registry capable of being transferred to anybody on July 9, 1979. In addition, Somoza had lost the vessels on June 17-22, 1979, so the request on July 10, 1979, to

endorse the transfer of vessel ownership onto the War Risk policy constituted a misrepresentation or concealment of material fact sufficient to constitute the fraud perpetrated on the defendants as a necessary element for warranting the District Court to disregard the corporate existence and titles even on the Second Circuit's re-edited version of its own appellate standards.

Further, by ignoring the District Court's findings, the Second Circuit led itself into the irreconcilable position of having to ignore its own findings that the vessels were "commandeered" or "seized" by the crews, and "detained" by Panama as of June 17-22, 1979, at which time all vessels were under Nicaraguan registry, and at which time two of the three vessels "detained" by Panama were owned by Panamanian corporations. Its position became further irreconcilable when it applied the doctrine of retroactive validation solely to "confiscation" while, at the same time, ignoring its own findings that the vessels were "commandeered" and "seized" and "detained". Apart from obviously misreading or not reading the Appellee Briefs by relying substantially on the Sue and Labor argument advanced by the Marine Risk Underwriters as a basis for reversing against War Risk Underwriters, the Second Circuit's own language, clearly established that at least the two Panamanian owned vessels were outside the scope of its remand instructions.

By limiting appellate review to "confiscation" and refusing to test the other excepted causes of loss against its own findings of fact, the Second Circuit violated another of its own standards for such appellate review, i.e., the judgment of a lower court may be affirmed on the basis of any argument that is supported by the record whether it was ignored by the court or flatly refused. *Mitsui & Co., Ltd., v American Export Lines*, 636 F.2d 807, 823 n. 21 (2d Cir. 1981). Having found confiscation within the exclusionary language, the District Court was not required to reach the other excepted causes of loss so they could not become an issue on appeal except to the extent that they were cited to the Court during oral argument as a further basis for affirming below. The fact so clearly spelt out the other excepted causes of loss, as evidenced by the Second Circuit's own lan-

guage, that it was clearly erroneous for those facts not to be the subject of appellate review. As already held by this Court in *Standard Oil Co., v United States*, 267 U.S. 76, 79 (1924):

> "As was said of similar facts in *Muller v Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759, 762, that the vessel and her cargo were seized, arrested and detained within the meaning of the policy we think too plain to require much more than mention."

(2) OVERRIDING IMPORTANCE TO MARINE INSURANCE COMMUNITY:

In complete consonance with the above quoted language by this Court, the petitioners agree that the precise language used by the Second Circuit to describe factually what had happened to the vessels was simply "too plain to require much more than mention". However, even though the case is still in the appellate stages, the language used by the Second Circuit already has been attacked as being ambiguous by, of all parties, the respondents herein, who were the sole intended beneficiaries of that language. To put the point in proper focus, as noted above, we attempted to file a second Petition for Rehearing on November 24, 1982 to correct the obvious injustice which was manifested by the very language of its August 30, 1982 opinion: and respondents filed an opposing Affidavit on November 30, 1982 strenuously objecting to the Petition.

We quote the language by the Second Circuit, and also by the respondents wherein they contend that the Second Circuit did not actually say what it did say:

> "It is undisputed in this case that both Cuba and Panama were opposed to the Somoza government and were actively abetting the Sandinista cause. Their activities in connection with the ship seizures indicated quite clearly that they were not about to hand the ships back to their owners. Mr. Renaldy Gutierrez, a Nicaraguan lawyer, testified that the ships could

not have been recovered from Panama or Cuba because of the ships' connection with Somoza. Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships detained there, but without success." (App. A page A-9)

Whereas respondents contended that:

"3. It should be noted that the defendants-appellees, WAR RISK UNDERWRITERS, have taken a portion of the Court's August 30, 1982 decision completely out of context. The Court did not say that two of the vessels were detained by Panama as the WAR RISK UNDERWRITERS allege in paragraph 2 of their moving affidavit. What the Court said was:

Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships *detained there*, but without success. 687 F. 2d 639, 644 [Emphasis added].

A reading of the decision clearly shows that this Court never found a detention by the Panamanian government within the meaning of the war risk policy exclusions nor, for that matter, did the district court. What this Court did hold is that the loss of the vessels was caused by their prior unlawful taking by the respective crews and not by anything that happened in Panama. See 687 F.2d 639, 642 *et seq.*" (Opposing Affidavit November 30, 1982). (App. G page A-36)

To rebut the out of context allegation, we quoted above the entire paragraph wherein the Second Circuit summarized its earlier findings that the Cuban authorities took over the HOPE on June 17, 1979 and the Panamanian authorities took over the EL SALVADOR, HONDURAS and MANAGUA on June 22, 1979, Petitioners never questioned the plain meaning of the Second Circuit's language but cited that language in the Petition for Rehearing (and in the Petition herein) for certain error in failing to test the facts exemplified by that language against the other excepted causes of loss in the War Risk Clauses. However

by questioning the plain meaning of that language the respondents merely resurrected the pivotal question already left unanswered for posterity by the Second Circuit:

If the vessels were not detained by Cuba and Panama in trust for the Sandinistas, then by whom and for whom were the vessels detained?

Harking back to *Standard Oil* (supra), we point out that this Court was then faced with the interpretation of "takings at sea, arrests, restraints, and detainments", in a situation wherein a neutral U.S. merchant ship was stopped and boarded by the British Navy for deviation to a British port during World War I. In 1925 this Court had no semantic problem in holding that the vessel was seized, arrested, and detained within the meaning of that insuring phrase. Yet, less than sixty years later, on similar facts, the Second Circuit can find as fact that vessels were "commandeered", "seized", and "detained" but cannot conclude as a matter of law that the vessels were lost due to "capture, seizure, arrest, detainment" within the meaning of the same generic insuring phrase.

The question presented by *Standard Oil* was whether or not a subsequent loss of the ship due to striking a rock after the taking was a marine peril or a war peril for coverage purposes. Both the District Court and the Second Circuit herein agreed that the Somoza vessels were lost as a result of the civil war but thereafter disagreed as to the interpretation of the war risk exclusionary language. However *Standard Oil* is controlling herein because it unequivocally and unambiguously spelled out that (by substituting Sandinistas for British Navy), the Somoza vessels were lost due to "capture, seizure, arrest, restraint, detainment" within the exclusionary language of the War Risk Clauses.

The adverse effect of this decision on the international marine insurance community actually is the focal point of this Petition, although its paramount importance necessarily had to abide laying a proper foundation by establishing the Second Circuit's failure to realize its inherited duty to that community. In 1925,

Justice Holmes on similar facts simply but unequivocally interpreted the language at bar, whereas in 1982, the Second Circuit's use of the same language was attacked as ambiguous practically before it was dry on the paper, by the very parties who were the sole beneficiaries of that language. If marine insurance is to maintain its traditional continuity, and if words are to have any common meaning to admiralty bench and bar, to vessel owners and marine underwriters, this Court must determine whether Justice Holmes or Judge Van Graafeiland properly interpreted that language.

(3) CONFLICTING DE JURE AND DE FACTO GOVERNMENTAL RIGHTS:

The case presented a relatively simple fact pattern involving four ships which were private assets of Somoza that were seized by the Sandinistas and taken to Cuba and Panama for safekeeping until Somoza was overthrown. Based on the evidence at trial, the District Court concluded that, having lost the vessels in June, Somoza could not have passed valid title in July *unless and until* he was victorious in the civil war. This conclusion was dismissed by the Second Circuit (App.A page A-7).

> "The district court's statement that the Cayman Islands corporations did not acquire good title to the ships, 'one that would be recognized in Court as against the new Nicaraguan Government', 521 F. Supp. at 350, is interesting but irrelevant conjecture. The Nicaraguan Government is not a party to this action. *See Pelton v. Westchester Fire Insurance Co.*, 77 N.Y. 605 (1879)."

By rejecting the District Court's conclusion as "interesting but irrelevant conjecture", solely on the authority of a century old New York case construing equitable interest in property for fire insurance purposes, the Second Circuit again illustrated its failure to grasp the root issue of this case. For comparison purposes, we quote the reasoning upon which the District Court's conclusion was based:

> Somoza's attempt to transfer the corporate titles and registrations of the four ships in order to avoid the effect of this clause was ineffective and a sham. The ships had already been taken from Somoza's possession by the Sandinistas when this attempt was made. As the Privy Council noted in *Civil Transport Incorporated v. Central Air Transport Corporation* (1953) A.C. 70, 2 Lloyd's Reg. 209 (Privy Council)
>
> Subsequent recognition de jure of a new government [the Sandinista Government] as the result of successful insurrection can in certain cases annul a sale of goods by a previous government [Somoza]. If the previous government [Somoza] sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government [Somoza] never regains the goods and the de facto new government becomes recognized. . . . as the de jure government, purchasers from the old government [Somoza] will not be held in her Majesty's courts to have a good title after that recognition. *Id.* at 93." (App. B page A-24)

In practical effect, the District Court was equating its own reasoning on the Somoza/Sandinista civil war with the earlier reasoning of the Privy Council on the Nationalist/Red China civil war because each case involved parallel fact patterns. The District Court and the Privy Council merely reiterated the simple historical fact that, in civil war situations, winners take all; and the Sandinistas had taken Somoza's ships. Viewed against historical reality, the Second Circuit's conclusion was an interesting but irrelevant non sequitur.

The Second Circuit's reasoning was even more irrelevant in questioning the subsequent actions of the Sandinista government vis-a-vis the Confiscation Decree and the Condemnation

Proceedings. After having the Decree entered into evidence at trial solely to prove that the vessels were confiscated, appellants argued on appeal that the Decree was only an "enabling" statute, which required further actions by the Attorney General to "implement" confiscation. The Second Circuit obviously was sufficiently impressed by this argument to overrule the District Court by decrying the Attorney General's failure to issue a confiscation order. As a basis for seeking such order it invoked the authority of this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401-403 (1964).

However the authority was invoked in vain because *Banco* as pointed out by this Court in its preamble remarks at page 401, involved an entirely different breed of statutory reprisal:

> "The law gave the Cuban President and Prime Minister discretionary power to nationlize by forced expropriation property or enterprises in which American nationals had an interest".

By any fair reading, the Nicaraguan Confiscation Decree did not give the Attorney General discretionary authority in view of the fact that it used the phrases "immediately proceeding" and "all the assets", which certainly are not discretionary suggestions in a totalitarian regime. By the same token, the Attorney General did not have to confiscate the ships as they already had been captured, seized, arrested, restrained, and detained by the crews and by Cuba and Panama, awaiting the day when such a Confiscation Decree could be issued. To which the Second Circuit apparently agreed:

> "The ships remained in Cuba and Panama until after the Sandinistas gained complete control of the Nicaraguan government." (App. A page A-3)
>
> "The commandeered vessels were taken into the waters of nations known to be friendly to the revolutionary cause, and were returned to Nicaragua only after Somoza was ousted, and the Sandinistas were in control. Moreover, it is evident from the concerted nature of the activities that the seamen acted under orders from a central authority." (App. A page A-5)

Despite its definitive and unequivocal findings of fact with respect to the fate of the vessels the Second Circuit, for whatever reason, refused to equate these findings with the known facts of history and the accepted rules of international warfare. Cuba never recognized Somoza; Panama recognized the Sandinista Junta on June 22, 1979; and the United States never ceased recognition of Nicaragua during the Somoza regime through the Sandinista regime to date. Therefore, in practical effect, and the United States Department of State notwithstanding, the Second Circuit refused to recognize Nicaragua as of July 20, 1979 because the Attorney General did not issue a confiscation order pursuant to the Confiscation Decree which did not require such an order in the first instance.

The simple fact of the matter is that the vessesls were irrevocably lost to Somoza as of June 17-22, 1979 on which dates all vessels were under the Nicaraguan flag. The vessels were returned by Cuba and Panama to the Sandinista government of Nicaragua in August, 1979, which constituted *nunc pro tunc* retroactive validation of the "capture, seizure, arrest, restraint, detainment or confiscation" of the vessels by the Sandinista crews, Cuba and Panama on June 17-22, 1979. What the Sandinista government chose to do with the vessels in 1980 was not a matter about which the Second Circuit was permitted to speculate for purposes of overruling the District Court. The saddest commentary on the futility of its speculation was uttered by the Second Circuit in summing up its conclusions of the sue and labor argument (which was never argued by War Risk Underwriters):

> "Assuming that the insureds' representatives could have entered Nicaragua safely***". (App. A, page A-9)

That utterance sums up the complete irrelevance of the Second Circuit's opinion because it conclusively proves that the vessels were irrevocably lost to Somoza as soon as the vessels were taken by the crews to Cuba and Panama. (see App. D pages A-28,29)

The undisputed fact of the matter is that it did not make the slightest difference in the world to Somoza or to the Sandinistas,

or to Cuba or to Panama, or to the crewmembers, that the Attorney General did not issue a confiscation order because all these vitally interested parties knew that the vessels were long gone from Somoza. The studied bewilderment in August, 1982 concerning the executive competence of the Attorney General of Nicaragua for allegedly failing to implement a Confiscation Decree of the Nicaraguan government with respect to property within Nicaraguan territory, which was used by the Second Circuit as its basis for overruling the District Court, not only violates the act of state doctrine but, in the same breath, nullifies the principle of retroactive validation. Again, the studied failure of the Second Circuit to come to grips with legal and historical reality is summed up in its own, almost jocular language commenting on the demise of General Somoza:

> "Association with the deposed Nicaraguan regime apparently was not conducive to longevity" (App. A pages A-8, 9),

which was probably intended to convey that, with lives as well as with ships, the Sandinistas always played for keeps.

In summary, the Second Circuit for reasons of its own, elected to reverse an experienced trial judge by reaching contrived conclusions of law which were negated by its own findings of fact, particularly with respect to the two Panamanian owned vessels. Unfortunately the case, rather than being limited to a contractual dispute between U.S. residents over property within the jurisdiction of a U.S. Court, presents paramount questions on conflicting de jure and de facto governmental rights, the determination of which directly impacts on the entire international marine insurance community. Instead of meeting its obligation to that community by interpreting the policy language prepared by the American marine insurance community to deal with those conflicting governmental rights, the Second Circuit evaded its obligation by reversing below on language which was immediately attacked as ambiguous by the intended beneficiaries of that language.

More importantly, if permitted to stand, the decision will only leave a legacy of confusion for future generations of admir-

alty bench and bar, and vessel owners and marine underwriters. If the decision be permitted to stand, the only possible inference to be drawn is that our appellate courts are neither desirous nor capable of rendering an authoritative interpretation of the language of American marine policies which are thrown into the mainstream of international commerce. The American marine insurance community can only hope that, if the decision be permitted to stand, the American courts and the world in general will little note nor long remember what was said there.

CONCLUSION:

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX A

OPE SHIPPING, LTD. and El Porvenir Shipping Company, Inc., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity & Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants-Appellees.

VADOR SHIPPING, LTD., and Cia. de Navegacion La Libertad, S.A., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity & Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants-Appellees.

AGUA SHIPPING, LTD., and Cia. De Navegacion Corinto, S.A., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity and Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants-Appellees.

DURAS SHIPPING, LTD., and Nicaraguense, S.A., Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH UNDERWRITERS AND UNDERWRITERS AT LLOYDS, DEFENDANTS-APPELLEES.

No. 693, Docket 81-7701.

United States Court of Appeals, Second Circuit.

Argued Feb. 22, 1982.

Decided Aug. 30, 1982

Joseph F. De May, Jr. New York City (Victor S. Cichanowicz, Alfred F. Koller, Jr., and Cichanowicz & Callan, New York City, on the brief), for plaintiffs-appellants.

Michael J. Ryan, New York City (Frank H. Loomis and Hill, Betts & Nash, New York City, on the brief), for defendants-appellees Marine Risk Underwriters.

Brendan J. Connolly, New York City (Mendes & Mount, New York City, on the brief), for defendants-appellees War Risk Underwriters.

Before WATERMAN, VAN GRAAFEILAND and MESKILL, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

Plaintiffs appeal from orders and a judgment of the United States District Court for the Southern District of New York, 521 F.Supp. 342, Pollack, J., denying them recovery of the insured value of four ships. We affirm in part and reverse in part.

In June, 1979, the *El Salvdaor*, the *Hope*, the *Managua* and the *Honduras* were owned respectively by three Panamanian corporations and one Nicaraguan corporation, all apparently under the control of General Anastasio Somoza. The ships were registered under the Nicaraguan flag. The four vessels were lost to their owners during the 1979 Nicaraguan revolution which resulted in the overthrow of the Somoza government by Sandinista forces. The chronology of events leading to the demise of the Somoza regime is set forth in the opinion of the court below, reported in 521 F.Supp. at 342.

On June 17, 1979, the *Hope* was taken over by four armed crew members who identified themselves as Sandinistas and ordered the ship's captain to proceed to Cuba. In Puerto Nuevita, Cuba, Cuban authorities came aboard the *Hope* and sailed it to Mariel, Cuba, where it remained until it was returned to Nicaragua.

On June 22, the *El Salvador* was removed from the Canal Zone to Panamanian waters while its captain was ashore. The chief mate stated that five armed crew members, who identified

themselves as Sandinistas, ordered the transfer and hoisted the Sandinista flag. The Panamanian Maritime National Guard took control of the ship. The *Honduras* and the *Managua* suffered similar fates around June 22. The *Honduras* was taken from the Canal Zone into Panamanian waters, while the *Managua* slipped out of El Salvador in contravention of orders and also was taken to Panama.

On June 24 and 28, 1979, Somoza informed his longtime business associate Joseph Baittiner about the fate of the ships. At Somoza's request, Baittiner then undertook to transfer title of the ships to Cayman Islands corporations. On July 9, papers were executed for the transfer of the *Hope* from El Porvenir Shipping Co., Inc. to OPE Shipping, Ltd., the *El Salvador* from Cia. de Navegacion La Libertad, S.A., to Vador Shipping, Ltd., the *Honduras* from Marine Mercante Nicaraguense, S.A. to Duras Shipping, Ltd. and the *Managua* from Cia. de Navegacion Corinto, S.A. to Agua Shipping, Ltd.

On or before July 10, the marine risk coverage on the ships was cancelled, either for non-payment of premiums or because of the change in ownership. On July 11, the war risk insurers authorized the assignment of their policy to the Cayman Islands corporations. On July 13, the vessels were registered under the British flag in the Cayman Islands.

The ships remained in Cuba and Panama until after the Sandinistas gained complete control of the Nicaraguan government. The vessels were returned to Nicaragua in August, 1979, and on September 28, 1979, plaintiffs sued in the court below to recover their insured value.

In the summer of 1980, the Empresa Nacional de Puertos, an agency of the Sandinista government, commenced actions in the First District Court of Managua, Nicaragua, to recover port charges for the four ships which had accrued while they were laid up in Corinto, Nicaragua. The ships were attached pursant to judicial orders, and, following the entry of judgments, were offered for sale at public auction and purchased by Empresa for the amount of the charges owed.

Plaintiffs claimed that their losses were covered by both the marine risk and war risk policies. The district court held that they were covered by neither. For the reasons discussed below, we affirm as to the marine risk but reverse as to the war risk.

THE MARINE RISK POLICIES

At the time the ships were diverted from their courses, the marine risk insurance was in effect. The marine policy covered loss due to barratry of the master and mariners and other like perils, but specifically excluded loss resulting from civil war, revolution, rebellion, insurrection or civil strife arising therefrom, hostilities or warlike operations, whether or not there was a declaration of war.

Barratry has been defined as "an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury." *Marcardier v. Chesapeake Insurance Co.*, 12 U.S. (8 Cranch) 39, 49, 3 L.Ed. 48 (1814). It consists of serious misconduct or dishonest breach of trust resulting in prejudice to the owner, Gilmore and Black, *The Law of Admiralty* 73 (2d ed. 1975); *Couch on Insurance 2d* § 43:38 (1963), and may take place even though the disobedient crew or master did not act with an intent to derive personal benefit from the wrongful act, *id.* § 43:39.

There can be little question that the four crews were guilty of barratrous conduct. Uncontradicted testimony established that they forced the masters to relinquish control of their ships and then sailed to the vessels to the waters of nations hostile to Somoza and friendly to the Sandinista cause. These actions were in clear derogation of the crews' duties to shipowners.

However, because of the policy exclusions, the barratrous acts cannot be viewed in isolation without consideration being given to causative and motivative factors. When ascertaining the legal cause of loss for insurance purposes, a court must look to the "real efficient cause" of the occurrence rather than the single

cause nearest in time to the loss. *Blaine Richards & Co. v. Marine Idemnity Insurance Co.*, 635 F.2d 1051, 1054 (2d Cir. 1980) (quoting *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556, 565, 58 S.Ct. 371, 375, 82 L.Ed. 422 (1938)). Determination of proximate cause is a matter of "applying common sense and reasonable judgment as to the source of the loss alleged." *Blaine Richards & Co. v. Marine Indemnity Insurance Co., supra*, 635 F.2d at 1054–55. From a common sense standpoint, it is quite obvious that the unlawful conduct of the four crews was a direct result of the Nicaraguan civil war. The barratrous mariners took control of the ships in the name of the Sandinistas, professed to be acting under orders from the Sandinista regime and, in at least one case, hoisted the Sandinista flag over the ship. The commandeered vessels were taken into the waters of nations known to be friendly to the revolutionary cause and were returned to Nicaragua only after Somoza was ousted and the Sandinistas were in control. Moreover, it is evident, from the concerted nature of the activities, that the seamen acted under orders from a central atuhority. The district court did not err, therefore, in holding that the conduct of the crews fell squarely within the exclusions of the marine policy so as to relieve the marine underwriters from liability.

THE WAR RISK POLICY

The war risk policy complemented the marine risk policy by providing coverage for the risks excluded from coverage in the latter policy under the "War, Strike and Related Exclusions" clause. At first blish, therefore, it would seem that the very facts which relieved the marine underwriters from liability imposed liability upon the war risk underwriters. However, the war risk underwriters argued successfully below that they, too, were relieved of liability, because their own policy excluded coverage for losses due to "[c]apture, seizure, arrest, restraint, detainment, or confiscation by the Government . . . of the country in which the Vessel is owned or registered." We believe the district court should have rejected this argument.

Prior to July 9, 1979, title to the *El Salvador*, the *Hope*, and the *Managua* was, in each case, in a Panamanian corporation. Although the stock of these corporations may have been substantially or wholly owned by Somoza, under "generally applicable principles", *Fisser v. International Bank*, 282 F.2d 231, 238 (2d Cir. 1960) that fact, standing alone, did not warrant the court in piercing the corporate veils so as to place ownership of the vessels in Somoza and thus in the Country of Nicaragua. *Lehigh Valley Industries, Inc. v Birenbaum*, 527 F.2d 87, 94 (2d Cir. 1975); *Zubik v. Zubik*, 384 F.2d 267, 272,74 (3rd Cir. 1967). The defendants insured the corporations as owners and were paid for so doing. In the absence of a finding that such fraud or misrepresentation was perpetrated on the defendants as would make it inequitable to hold them to the terms of their contracts, the district court should not have disregarded the corporate existence and titles. *Lehigh Valley Industries, Inc. v Birenbaum, supra*, 527 F.2d at 94–95; *Brunswick Corp. v. Waxman*, 599 F.2d 34, 36 (2d Cir. 1979); *Hellenic Lines Ltd. v. Winkler*, 249 F. Supp. 771, 777–78 (S.D.N.Y. 1966). The district court erred, therefore, in holding that Nicaragua was the country of ownership of the *El Salvador*, the *Hope*, and the *Managua*, within the meaning of the war risk policy.

Exhibit No. 17, received in evidence curing the trial, shows that the Nicaraguan registry of all four ships was cancelled by Nicaraguan authorities on July 9, 1979. Any confiscation or detainment by the government of Nicaragua which occured after that date would not be excluded from coverage on the ground that Nicaragua was the country of registry.

Although, prior to July 9, title to the *Honduras* was in a Nicaraguan corporation, title to all four ships was transferred on that day to Cayman Islands corporations. In support of its holding that the four ships were owned in Nicaragua, the district court found that the transfer of title was "just a paper sham to obstruct the inevitable confiscation of the vessels by Nicaragua." 521 F.Supp. at 347. In reaching this conclusion, the district court seemed to be influenced in large measure by the lack of proof that any money changed hands, i.e., by the absence of consideration for the contract. It is on that basis that the war

risk insurers seek to justify the district court's finding. However, we find no merit in their argument.

Lack of consideration is available as a defense between parties to an executory contract. It is not grounds for avoiding a contract that has been fully performed. 17 Am.Jur.2d *Contracts* § 86. Where, as here, the parties to a conveyance are satisfied with their bargain, a third person who is not a defrauded creditor of the grantor may not challenge the contract's validity on the basis of alleged insufficient consideration. 37 C.J.S. *Fraudulent Conveyances* § 276. The district court's statement that the Cayman Islands corporations did not acquire good title to the ships, "one that would be recognized in Court as against the new Nicaraguan Government", 521 F.Supp. at 350, is interesting but irrelevant conjecture. The Nicaraguan Government is not a party to this action. See *Pelton v. Westchester Fire Insurance Co.*, 77 N.Y. 605 (1879).

Assuming for the argument that private ownership of the four ships remained at all time within the country of Nicaragua, the district court nonetheless erred in holding that "[t]he losses of the ships were the result of a confiscation by the Nicaraguan government . . . and, therefore, excluded from coverage by the war risk policy",, 521 F.Supp. at 349. When the ships were seized by their crews, the Sandinista rebels were not the "Government" of Nicaragua. After the Sandinistas became the legitimate government, all actions previously taken by it as a rebel government were validated retroactively. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302–03, 38 S.Ct. 309, 310–11, 62 L.Ed. 726 (1918). Accordingly, if the Sandinistas had chosen to treat the taking of the four vessels by their crews as a seizure or confiscation by the Sandinista government, it might be argued that, under the principle of retroactive validation, the loss was excluded from war risk coverage. The record is devoid, however, of any proof that the Sandinista government chose to ratify the confiscation of the ships, so that *nunc pro tunc* the confiscation became governmental action within the meaning of the insurance policy.

The Sandinista government commenced actions in 1980 against the Cayman Islands corporations as owners of the four vessels

to recover port charges accrued by the ships after they were returned to Nicaragua. Defendants' expert witness. Dr. Ortega, testified that, at the conclusion of those proceedings, the Nicaraguan government "became" the owner of the ships. The bringing of those actions and the sales of the ships to the Sandinista government belie the insurers' assertions that the Nicaraguan government had confiscated the ships in 1979.

Although the Sandinista government had issued a decree on July 20, 1979, authorizing the Attorney General to confiscate "all the assets of the Somoza family, military personnel and officials who have abandoned the country since December, 1977", the record does not indicate that the Attorney General ever issued a confiscation order pursuant to this authority. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401–03, 84 S.Ct. 923, 926–27, 11 L.Ed.2d 804 (1964). Had he done so, the Sandinista government would hardly have named the Cayman Islands corporations as owners and proceeded against them to recover port charges. because the loss of the ships did not result from "[c]apture, seizure, arrest, detainment or confiscation" by the Nicaraguan government, the loss was not excluded under the terms of the war risk policies.

The war risk policy contained the usual "sue and labour" clause. Pursuant to this clause, plaintiffs were obligated to exercise the care of prudent insured owners to protect their property, in order to prevent or minimize loss to the carriers. *Fishing Fleet, Inc. v. Trident Insurance Co.*, 598 F.2d 925, 929 (5th Cir. 1979). The duty is one of reasonable care under all the circumstances and in the light of pertinent commercial and maritime prctices. *Couch on Insurance 2d* § 43:136. It does not require the insured to use all possible care or to follow the wisest course. *Id.* Although the district court did not find a violation of this clause as a basis for its holding, the war risk insurers urge this Court to find such a violation as a basis for affirming. We decline to do so.

The proof shows that both General Somoza and his associate, Joseph Baittiner, were assassinated and that the captain of the *Hope* was stabbed and almost fatally injured in Cuba. Associa-

tion with the deposed Nicaraguan regime apparently was not conducive to longevity. It is undisputed in this case that both Cuba and Panama were opposed to the Somoza government and were actively abetting the Sandinista cause. Their activities in connection with the ship seizures indicated quite clearly that they were not about to hand the ships back to their owners. Mr. Renaldy Gutierrez, a Nicaraguan lawyer, testified that the ships could not have been recovered from Panama or Cuba because of the ships' connection with Somoza. Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships detained there, but without success.

The insureds' failure to participate in the *in rem* proceedings for port charges is readily understandable. Assuming that the insureds' representatives could have entered Nicaragua safely, there is no proof that they had timely notice of the proceedings, which was given by publication in a Nicaraguan newspaper of limited circulation. Moreover, the port charges levied against the ships were in excess of the value which the Nicaraguan court placed on the ships. Under these circumstances, plaintiffs' sue and labour activities, although limited, were all that a prudent person would have been expected to undertake.

DISPOSITION

The marine risk insurers are not liable for the loss of the ships, which was due to the civil war in Nicaragua. The judgment as to them is affirmed. The loss was covered by the war risk policies. The judgment in favor of the war risk insurers is reversed, and that portion of the case is remanded to the district court with instructions to enter judgment for plaintiffs, OPE Shipping, Ltd., Vador Shipping, Ltd., Agua Shipping, Ltd. and Duras Shipping, Ltd., against the war risk insurers pursuant to the terms of the war risk policy and the stipulations of the parties.

APPENDIX B

OPE SHIPPING, LTD., and El Porvenir Shipping Co., Inc., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., United States Fidelity & Guaranty Companies, Inc., Various British Underwriters and Underwriters at Lloyds, Defendants.

VADOR SHIPPING, LTD., and Cia De Navagacion La Libertad, S. A., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., et al., Defendants.

AGUA SHIPPING, LTD., and Cia De Navagacion Corinto, S. A., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., et al., Defendants.

DURAS SHIPPING, LTD., and Marina Mercante Nicaraguense, S. A., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, INC., et al., Defendants.

Nos. 79 Civ. 5225-5228(MP).
United States District Court,
S. D. New York.
Aug. 31, 1981.

Cichanowicz & Callan, New York City, by Victor S. Cichanowicz, New York City, for plaintiffs.

Hill, Betts & Nash, New York City, by Michael J. Ryan, Frank Loomis, Gregory O'neill, New York City, for defendants Marine Risk Underwriters.

Mendes & Mount, New York City, by Brendan J. Connolly, New York City, for defendants War Risk Underwriters.

MILTON POLLACK, District Judge.

FINDINGS AND OPINIONS

These are admiralty actions seeking recovery from "Marine" and "War Risk" underwriters of the agreed insured value of four commercial vessels which plaintiffs contend and defendants dispute were lost as the result of perils covered by the policies of insurance issued on those vessels. The case was tried to the Court at a Bench trial.

The vessels belonged to General Anastasio Somoza Debayle who carried the title thereto in the names of three wholly-owned Panamanian and one Nicaraguan corporation; all were registered under the Nicaraguan flag until about July 10, 1979. On or about that date Somoza caused the transfer of the nominal title from the three Panamanian and the Nicaraguan corporations to four corporations chartered in the Cayman Islands. The Panamanian, Nicaraguan and Cayman Islands Corporate title holders to the vessels respectively are plaintiffs herein.

The defendants are two separate groups of underwriters. The "Marine Risk" underwriters are Allstate Insurance Company, Inc. (50%); United States Fidelity and Guarantee Company, Inc. (25%); and Various Underwriters at Lloyd's and British Companies (25%); and the "War Risk" underwriters are described herein as Various Underwriters at Lloyds (100%).

Both the marine and war risk policies commenced on May 15, 1979 and were to run for one year. The Allstate policy terminated on July 6, 1979 for non-payment of premiums. The other marine risk policies terminated on July 10, 1979 because of the transfer of the corporate title to the ships. The war risk insurers authorized the assignment of the war risk policy to the Cayman Islands corporations holding the title to the ships. The Cayman Islands corporations were not named in any marine policy issued by any of the defendants. Each vessel was insured at an agreed value of $1,000,000.

The plaintiffs rely on "barratry" in June 1979 as the casualty which overtook the vessels and contend that this is a covered event under the marine policy. Alternatively, plaintiffs contend that the proximate cause of their loss was the Sandinista insur-

rection and rebellion which plaintiffs contend is a covered event under the war risk policy. All four of the ships were taken by members of their crews and diverted to countries friendly with the Sandinistas (the Nicaraguan revolutionary group) in June 1979, before the incorporation and purported transfer of title to the Cayman Islands corporations named herein as plaintiffs.

The evidence convincingly establishes that the proximate cause of loss under the marine policy was the ongoing civil war in Nicaragua, a peril excepted by that insurance. Furthermore, the evidence showed that the property of Somoza and his family, including these vessels, was confiscated by Nicaragua in July 1979, a peril excepted by the war risk insurance. It was those events, not barratry on the part of the crews of the ships, that were the proximate causes of the casualties involved and consequently the plaintiffs herein are not entitled to any recovery from any of the defendants for the reasons more fully stated hereafter.

SUMMARY STATEMENT

It will aid understanding of the somewhat complicated facts to set forth initially a summary statement of the facts which will then be followed by the facts in more detail.

Civil war raged in Nicaragua during 1978 through about July 20, 1978, aimed at deposing the Somoza regime. General Somoza, the dictator of Nicaragua during that period, was the owner of four vessels registered under the Nicaraguan flag which were seized by revolutionaries among the members of the crews during June 1979 and then later turned over to and confiscated by the revolutionary government which came into power in Nicaragua on or about July 20, 1979.

The vessels were taken over by the Sandinista crew members thereof on direct orders from Sandinista authorities as agents of the insurrection and rebellion in Nicaragua against Somoza and the Somoza government. The vessels were then detained and held by Cuba and Panama by way of aiding and abetting the

Sandinista crew members and their Sandinista principals in Nicaragua in furtherance of the goals and in support of the interests of the Sandinistas and were ultimately returned and delivered by such crew members to Nicaragua.

In this lawsuit, the Somoza interests are claiming the insurance under Marine and War Risk policies that were issued covering these vessels.

In June and July 1979 it became increasingly apparent to Somoza that the efforts to drive him from office might succeed. Therefore, although the four vessels were already in hostile hands and beyond Somoza's control, and just before he officially abdicated on July 17, 1979 (but after he had announced that he was quitting), he caused the creation of four Cayman Islands corporations and instructed that the title of the vessels be transferred to them and that the vessels be registered under the flag of the Cayman Islands, a British entity. Through a charade of paper transactions attempting to create the semblance of a "sale" of the vessels to the Cayman Islands corporations, there was a purported transfer of the nominal title and registration of the vessels from the Panamanian and Nicaraguan corporate titles and registrations to the Cayman Islands corporate titles and registrations. No money or other consideration passed and the purpose clearly was to impede and frustrate the inevitable confiscation of the vessels by the revolutionaries. The transfer was a paper sham to hide the continuing Somoza ownership from the revolutionaries and the new government of Nicaragua which contended that Somoza had plundered the government treasury and that Somoza's assets were forfeit to Nicaragua.

Having seemingly assured himself that the purported transfer and other arrangements that he made of his interests were attended to, Somoza stepped down officially from office and fled from Nicaragua. The Junta, the new revolutionary government which took over, promptly passed laws forfeiting Somoza's goods to the State.*

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* Decree No. 3 of the government Junta of National Reconstruction of the Republic of Nicaragua on July 20, 1979 confiscates the property of the Somozas. It reads:

> Article 1. The Attorney General is authorized to immediately proceed with the taking over, requisitioning and confiscation of all the assets of

The history of the last seven week period of civil war prior to Somoza's abdication was detailed in the world press. That history is referrd to hereafter but only for the chronology as a backdrop to better understanding of the evidentiary data in the trial record—a chronology from sources whose accuracy so far as set forth herein cannot reasonably be questioned. See Rule 201, Federal Rules of Evidence.

According to the New York Times (N.Y. Times Index, Nicaragua 1978, 1979, pp. 764-767; 932-35):

2. A so-called Sandinista National Liberation Front undertook activities during 1978 to oust General Somoza; he refused to resign.

2. There was civil strife during most of 1978 in Nicaragua seeking Somoza's resignation, continuing into 1979.

3. On June 1, 1979 a communique to Nicaraguans broadcast by Sandinistas from Costa Rica announced that "The hour for overthrow of President Somoza has arrived" and in connection therewith the Sandinistas called a nationwide (Nicaraguan) strike beginning June 4, 1979 with insurrection to follow soon after. (Je 1, 7:6)

4. On June 4, 1979 Nicaraguans began the general strike aimed at deposing Somoza called by the Sandinist National Liberation Front. Cities not under fire were paralyzed by the general strike aimed at overthrowing Somoza. (Je 4, 7:4; Je 6, 13:3)

5. On June 7, 1979 President Somoza declared a state of siege to help combat the general strike and guerilla war. (Je 7, 3:2)

6. June 14, 1979 Americans were evacuated from Managua to Panama. (Je 14, 1:5)

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the Somoza family, military personnel and officials who have abandoned the country since December 1977;

Once said property has been taken over, requisitioned or confiscated, the Attorney General shall turn over everything that he has done to the competent authorities.

7. June 18, 1979 the Sandinistas name a provisional government of five leaders (a Junta). (Je 18, 1:3)

8. June 22, 1979, American Department of State Secretary Cyrus Vance, at an emergency meeting of the Organization of American States calls for replacement of the Somoza regime; Panama recognizes the provisional government named by the Sandinistas. (Je 22, 1:6)

9. June 24, 1979, the OAS calls for the immediate and definitive replacement in Nicaragua for President Somoza's regime. (Je 24, 1:6)

10. July 5, 1979, Somoza has agreed in principle to step down and to go into exile. (JL 5, 6:1)

11. July 8, 1979, Somoza is negotiating with the provisional Junta; meets Liberal Party leaders and his Cabinet and informs them for the first time of his decision to resign. (JL 8, 1:3)

[July 9, 1979: Somoza goes through the forms of transfer of the nominal titles of his four vessels to his newly-formed Cayman Islands corporations and reregistration thereof in Cayman Islands.]

12. July 10, 1979, five member Junta calls itself the Nicaraguan Government of National Reconstruction. (JL 10, 3:4)

13. July 18, 1979, Somoza resigns and flies to Miami, Florida. (JL 18, 1:1)

14. July 20, 1979, the Sandinistas take control of Nicaragua completing the defeat of National Guard and ending the seven week old war (more than 10,000 people dead). The new government expropriates the entire business empire of Somoza. (JL 20, 1:3)

15. July 24, 1979, the Revolutionary Government announces that it will extradite Somoza and his family and seek recovery of their illicit enrichment. (JL 24, 3:1)

The relevant history of the civil war during that period is also chronicled (in part) in *Productos Carnic, S.A. v. Central Am.*

Beef and Seafood Trdg. Co., 621 F.2d 683 (5th Cir. 1980), a litigation concerning a confiscated Somoza asset.**

In August 1979 the four ships were returned by Panama and Cuba to the government of Nicaragua. They were subsequently sold in a judicial sale to cover expenses that accrued against them while they were anchored in the Nicaraguan harbor. Although there was due publication in the official newspaper, La Gaceta, of the judicial proceedings, no one representing the Nicaraguan, Panamanian or Cayman Islands corporations or General Somoza appeared to contest the sale. No suit was ever filed on behalf of any of the Somoza interests to recover the vessels in Nicaragua, Panama or Cuba. The present suit was filed on September 28, 1979.

The facts in more detail
The Taking of the Ships in June 1979

1. The HOPE (owned by Somoza in the names of El Porvenir Shipping Company, Ltd. and then Ope Shipping Ltd. and chartered during this period to Mamenic Line (Marina Mercante Nicarguense S.A.)

Captain Theodoratos testified that the HOPE was taken by four crew members armed with machine guns and pistols on June 17, 1979. They ordered him to proceed to Cuba and threatened to start to kill the crew if he did not. The four identified themselves as Sandinistas and stated that they had received orders to proceed to Cuba. The HOPE sailed first to Pueerto Nuevita in Cuba. There, Cuban authorities boarded the ship and a Cuban captain sailed it ot Mariel, Cuba. The HOPE remained in Cuba until late August when it was sailed back to Nicaragua.

** "Insurrection, armed conflict, battles in the street, terrorist attacks, riots, war, revolution, and the overthrow of a dictator permeate this appeal. General Anastasio Somoza was forced to resign as President of Nicaragua on July 17, 1979. The new government promptly nationalized a great portion of the vast holdings of Somoza and his family, including a small Nicaraguan meat processing company—already close to bankruptcy—Productos Carnic, S.A." *Id.* at 685.

The insurance agent for the four ships, Moreno, telexed American Marine Underwriters that the HOPE was "taken over by Sandinista Elements of crew and put into Cuban port of Refuse . . . where presently detained."

2. The EL SALVADOR (Owned by Somoza in the names of Cia de Navegacion La Libertad, S.A. and then Vador Shipping, Ltd. and chartered during this period to Mamenic Line.)

Captain Nichols testified that the ship was in Canal Zone waters on June 22, 1979. While he was ashore, the ship was removed to Panamanian waters and delivered to the Panamian Maritime National Guard. He was not permitted to go aboard except to pick up his belongings. He was told by the Chief Mate that five crew members armed with knives had ordered the ship moved into Panamanian waters. These five identified themselves as representatives of the Sandinistas and hoisted the Sandinista flag.

Moreno notified the marine risk insurers that the vessel was "detained" by "Panamanian Authorities".

3. The HONDURAS (Owned by Somoza in the name of Mamenic Line, viz, Marina Mercante Nicaraguense, S.A. and then Duras Shipping Ltd.)

Fausto Amador, former general manager of Mamenic Line, testified that he was notified by Mamenic's agents in Balboa that the ship had been taken from the Canal Zone into Panamanian waters by the crew and delivered to Panamanian authorities. Moreno notified the marine risk insurers that the ship was "detained" by "Panamanian authorities".

4. TheMANAGUA (Owned by Somoza in the names of Cia de Navegacion Corinto, S.A. and then Agua Shipping Ltd. and chartered during this period to Mamenic Line.)

Albert Griffith, general agent of Mamenic Line in El Salvador, testified that the MANAGUIA was anchored in Acajutla, El Salvador and he was instructed by his principals to hold the ship in port until further instructions were received. Despite Griffith's instructions not to allow the ship to leave port, it

managed to slip out leaving behind a portion of the crew. The crew members who were left behind did not wish to be sent back to Nicaragua. Moreno notified the marine risk insurers that the MANAGUA was "detained" in Panama.

The Transfer of the Corporate Titles and Registrations of the Ships

On June 24, 1979, General Somoza wrote to Mr. Joseph Baittiner, his long-term business associate, advising him that the EL SALVADOR and HONDURAS were in Panama. He wrote on Mamenic Line stationery in his capacity as president of the corporation. He instructed Baittiner to take such action as he deemed necessary to protect all vessels owned or chartered by Mamenic Line including transferring them to new corporations under the jurisdiction and flay of other countries, changing their name and assigning all insurance policies. Somoza reconfirmed these instructions on June 28 when he wrote Baittiner advising him that the HOPE was in Cuba and that the MANAGUA might be going to Panama.

Baittiner traveled to Panama in late June or early July and saw the ships. He made no effort, however, to reclaim possession. He told an American lawyer who was in Panama arranging to have the cargo on two of the Somoza ships removed that he felt it would be too costly and time-consuming to attempt to regain possession. He said that the best thing to do was to leave them in Panama.

Having decided not to try to regain possession of the ships, Baittiner chose instead to arrange for a sham transfer of title to the four Cayman Islands shell corporations. To this end, Baittiner communicated with Truman A. Skinner, an attorney in Miami, in May or June of 1979 and asked him to draw up the appropriate papers. The papers prepared in connection with the "transfer" in Miami include minutes of a "Special Meeting of Shareholders" of the Panamanian corporations purportedly selling the HOPE, MANAGUA and EL SALVADOR. Mr. Skinner acted as the so-called "President ad-hoc." Rose Mendez, a sec-

retary in Mr. Skinner's law firm, acted as the "Secretary ad-hoc." Skinner and Mendez were listed as the sole shareholders of the three Panamanian corporations.

Not only does Mrs. Mendez appear as a so-called "shareholder" of the Panamanian corporations, she is also referred to as "Assistant Secretary" in resolutions of the Cayman Islands corporations granting powers of attorney to Baittiner to "purchase" the vessels for the Cayman Islands corporations. Mr. Skinner testified that Baittiner appointed Mrs. Mendez as "Assistant Secretary" of those corporations. The ubiquitous Mrs. Mendez also functioned as a notary public. Powers of attorney to "sell" the vessels were given to Julio Somoza, a son of General Somoza.

With respect to the HONDURAS, owned by Mamenic Line, the "document of sale" is a notarial document prepared by Renaldy Gutierrez, a notary public and occcasional attorney for Mamenic Line who succeeded Mr. Baittiner as President of the four Cayman Islands corporations after Mr. Baittiner's assassination. Mr. Baittiner was the nominal "purchaser" of the HONDURAS.

Mr. Skinner's law firm billed General Somoza for the services performed in conjunction with the preparation of the papers and transactions done in Miami.

The papers for these transfers were completed in Miami on July 9, 1979 and immediately taken to Managua by Gutierrez. On July 13, 1979 the vessels were registered under the British flag in the Cayman Islands. There is no claim of any payment of any consideration for the transfers and no witness saw any money pass.

On July 14, 1979 Mr. Baittiner reported his doings to General Somoza, advising him of the transfer of the vessels to corporations under Cayman Islands flag.

Somoza's attempt to mask his actual and continued beneficial ownership of the four vessels by that series of paper transactions did not serve to put the ships beyond the reach of Nicaragua from which he was preparing to and did flee. He had already

announced prior thereto that he would resign and thereafter instructed his agents to go through the forms of a sale and transfer of the vessels, their Nicaraguan deregistration and reregistration in Cayman Islands. No new ownership in fact was created—there was no bona fide sale—the whole of these maneuvers was just a paper sham to obstruct the inevitable confiscation of the vessels by Nicaragua—and they are not entitled to any legal effect for purposes hereof. During this entire period the vessels were under charter to Mamenic Line which was also nationalized as soon as Somoza resigned and fled.

The trial testimony was: that these four vessels belonged to Somoza; that the new government took the position that everything that belonged to Somoza previously belonged to Nicaragua under the expropriation order; that the purported transfers of the titles in July were of no effect and were not recognized by the new government: and that the purported Cayman Islands title-holders have made no claims to the vessels allegedly because they would have been futile—there was no chance of success. A decree was passed by Nicaragua in August or September, 1979 which authorized anyone who was or felt injured by the actions of the government to assert their claims; however, this would have required the admission that Somoza was requesting the property and a claim by Somoza would have been futile. It was further testified that at all events the four vessels are in Nicaragua under the control of the Nicaraguan government and being held by it because they were Somoza's property. The Nicaraguan government is a government recognized by the United States.

Finally, in the last minute scurrying by Somoza's numerous agents to try to save Somoza's assets from confiscation by the Sandinistas, one element of the paper shuffle may have been overlooked. Mamenic Line was the bareboat charterer of the EL SALVADOR, the HOPE and the MANAGUA as well as the owner of the HONDURAS. In the rush to prepare all the documents necessary for the pruported sale of the four ships, the documents necessary for termination of the Nicaraguan bareboat charters may never have been prepared. Amidst the abundance of documents introduced into evidence by plaintiffs,

the cancellations of the charters are conspicuously absent. Fausto Amador, the manager of Mamenic Line, and a long-time and devoted employee of Somoza's testified that he signed cancellation documents, but it is notable and suspicious and tends to cast doubt on his testimony, that these are the only documents which were not carefully shuttled back from Managua to Miami by Mr. Gutierrez just before the fall of the Somoza regime. Thus, there is some likelihood that the transfer of title, itself a sham, was ineffective even by its own devices. If Mamenic Line remained the bare boat charterer after the transfer of title, Mamenic Line had legal rights to the possession of the four ships even after the transfer of title. When Mamenic Line was nationalized by the Sandinista Government its right to possession transferred to the new government which then confiscated the ships as an Act of State.

The Insurance Coverage

The marine (hull) risk insurance covers the perils of "barratry of the Master and Mariners" . . . "excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by the endorsement thereon". Under the head of WAR, STRIKES AND RELATED EXCLUSIONS the policy reads "This policy does not cover any loss, damage or expense caused by, resulting from or incurred as a consequence of:

> (e) civil war, revolution, rebellion, insurrection or civil strife arising therefrom. . .

The War Risks Clauses include insurance coverage to cover "only those risks which would be covered by the attached Policy (including collision liability) in the absence of the War, Strikes, and Related Exclusions Clause, However, under EXCLUSIONS it is provided that

> This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

> (f) capture, seizure, arrest, restraint, detainment, or confiscation by the Government of the United States or of the country in which the Vessel is owned or registered.

Liability of the Marine Risk Insurers

The Marine policy covers barratry. The classic definition of barratry was given by Lord Ellenborough in *Earle v. Rowcraft*, 8 E. 126, 138 (1806), as follows:

> . . . a fraudulent breach of duty by the Master, in respect to his owners; or, in other words, a breach of duty in respect to his owners with a criminal intent, or *ex maleficio*, is barratry.

In the *Republic of China v. National Union Fire Insurance Co. of Pittsburgh*, 151 F.Supp. 211 (D.Md. 1957), *aff'd in part and rev'd in part*, 254 F.2d 177 (4th Cir. 1958), *cert. denied*, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed.2d 64 (1958) Chief Judge Thomsen stated at p. 227:

> If the Captain deviates, or is compelled by the crew to deviate the vessel from its proper course and to put into an unauthorized port in fraud of his or their duty to owners, it is barratry.

Thus, if the loss herein was caused by barratry, plaintiffs are entitled to prevail. The marine underwriters contend that the loss was caused by civil war which is not covered by their policy, but is an excluded risk. There is little doubt that barratry, as it is classically defined, occurred and contributed to the loss of the ships. The barratry would not have occurred, however, but for the civil war. The real underlying cause of the loss of the ships was the civil war in Nicaragua. Loss resulting from civil war is noto covered by the marine policy.

In *Republic of China, supra*, it was held that the loss, though brought about by barratry, was a consequence of civil war and hence was not covered by the marine risk policy. The Court

held that the F.C.&S. Clause "excludes from the coverage of the marine risk policy any barratry which is a consequence of civil war", . . . 151 F.Supp. 211, 235.

The loss of the four Somoza ships was "incurred as a consequence of civil war."

> [I]n accord with the reasonable understandings and expectations of the parties, we must attempt to ascertain what the Supreme Court has referred to as the "predominant and determining" or the "real efficient" cause of the loss. See, e.g. *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 58, 71 S.Ct. 135 [137], 95 L.Ed. 68 (1950); Determination of the proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the loss alleged. *Blaine Richards & Co. v. Marine Indemnity Insurance Co.*, 635 F.2d 1051, 1054 (2d Cir. 1980).

In *Pan American World Airways, Inc. v. Aetna Casualty and Surety*, 505 F.2d 989, 1017 (2d Cir. 1974) the term "civil war" was explained as follows

> "Insurrection" presents the key issue because "rebellion", "revolution," and "civil war" are progressive stages in the development of civil unrest, the most rudimentary form of which is "insurrection."

An insurrection is "a movement accompanied by actions specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof . . . if the insurrection or rebellion proceeds to the attainment of its objective, viz., the overthrow of the old constituted government and the establishment of a new one in its place, then the movement, retroactively will be dignified by the characterization of a 'revolution' " *Home Insurance Co. of New York v. Davila*, 212 F.2d 731, 736 (2d Cir. 1954).

Liability of the War Risk Insurers

The war risk insurers deny coverage under their policy claiming that the loss is excluded because it is a "capture, seizure, arrest, restraint, detainment or confiscation by . . . the country in which the vessel is owned or registered". (Emphasis added).

Somoza's attempt to transfer the corporate titles and registrations of the four ships in order to avoid the effect of this clause was ineffective and a sham. The ships had already been taken from Somoza's possession by the Sandinistas when this attempt was made. As the Privy Council noted in *Civil Transport Incorporated v. Central Air Transport Corporation* (1953) A.C. 70, 2 Lloyd's Reg. 209 (Privy Council)

> Subsequent recognition de jure of a new government [the Sandinista Government] as the result of successful insurrection can in certain cases annul a sale of goods by a previous government [Somoza]. If the previous government [Somoza] sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces action on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government [Somoza] never regains the goods and the de facto new government becomes recognized . . . as the de jure government, purchasers from the old government [Somoza] will not be held in her Majesty's courts to have a good title after that recognition. *Id.* at 93.

The agents of the de facto Sandinista Government took control of the ships in June, 1979 and delivered them for safekeeping to two nations, Panama and Cuba which recognized the Sandinista Junta as the legitimate government of Nicaragua. Somoza purported to transfer the title to the ships after they were seized by the Sandinistas. Somoza never regained the goods and the Sandinistas replaced him in power and replaced Somoza as the recognized de jure government. The purported transferee of the titles to the ships did not acquire good title, one that would be recognized in Court as against the new Nicaraguan Government. The nominal titles in which the ships were registered were at all times representative of Somoza's ownership in fact, an ownership that was and remained subject to Nicaragua. The paper charade engaged in by Somoza can be seen as nothing more than an attempt to evade factors involved

in the exclusions of the war risk policy. It is unlikely that the plaintiffs expected to enchance their chances of reclaiming the ships by their maneuvers. Their subsequent inaction—failure to assert any claim to the ships—supports this view. Mr. Baittiner's statement that it would be too time-consuming and expensive to sue for recovery of the ships in Panama is damning.

The complaints in these actions are dismissed and judgment in each case is to be entered in favor of the defendants.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a), Federal Rules of Civil Procedure.

So Ordered.

APPENDIX C

UNITED STATES SUPREME COURT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fifth day of November, one thousand nine hundred and eighty-two.

No. 81-7701

OPE SHIPPING, LTD and EL PORVENIR SHIPPING COMPANY, INC.,
Plaintiffs-Appellants,

—v—

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,
Defendants-Appellees.

VADOR SHIPPING, LTD., and CIA. DE NAVEGACION LA LIBERTAD, S.A.,
Plaintiffs-Appellants,

—v—

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,
Defendants-Appellees.

AGUA SHIPPING, LTD., and CIA. DE NAVEGACION CORINTO, S.A.,

—v—

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,
Defendants-Appellees.

DURAS SHIPPING, LTD., and MARINA MERCANTE NICARAGUENSE, S.A.,

Plaintiffs-Appellants,

–v–

ALLSTATE INSURANCE COMPANY, INC., UNITED STATES FIDELITY & GUARANTY COMPANIES, INC., VARIOUS BRITISH Underwriters and UNDERWRITERS AT LLOYDS,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the motion be reheard in banc having been filed herein by counsel for the defendant-appellee, War Risk Underwriters,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

_____

Francis X. Gindhart

Chief Deputy Clerk

APPENDIX D

A Marina Mercante Nicargüense, S.A.
Mamenic Line
Managua, D.N., Nicaragua, America Central
CABLE: MAMENIC TELEF. 26/01
APDO. 3523 TELEX No. 1011

Plaintiff's Exhibit
U.S. Dist. Court
S.D. of N.Y.
Ex. 34

June 24, 1979

Mr. Josèph P. Baittiner
Bogotá, Colombia

Dear Mr. Baittner:

I am informed that the EL SALVADOR and HONDURAS, which were seized by their crews, are in Panamá.

As per our telephone conversation, please proceed to Panama at once and take whatever actions you can to recover the vessels.

I view that it appears that Panama may no longer protect the intersts or assets of corporations formed in Panama, this letter serves to confirm the previous verbal instructions given to you to take such actions as you deem necessary tc protect all vessels owned or chartered by this corporation or in which it has an interest, including transferring them subject to any mortgages to new corporations under the jurisdiction and flag of other countries, changing their names and assigning all insurance policies to such new corporations as appropriate.

Very truly yours,
MARINA MERCANTE NICARAGUENSE, S.A.
by
ANASTASIO SOMOZA DEBAYLE
President

A Marina Mercante Nicargüense, S.A.
Mamenic Line
Managua, D.N., Nicaragua, America Central
CABLE: MAMENIC TELEF. 26/01
APDO. 3523 TELEX No. 1011

Plaintiff's Exhibit
U.S. Dist. Court
S.D. of N.Y.
Ex. 35

June 28, 1979

Mr. Joseph P. Baittiner
Bogotá, Colombia

Dear Mr. Baittiner:

As per our telephone conversation, I have now learned that the HOPE, which was also seized by her crew, is in Cuba. The MANAGUA has also disappeared and may be going to Panama. I have no information about the Costa Rica.

Please proceed with the previous verbal and written instructions given to you.

Very truly yours,

MARINA MERCANTE NICARAGUENSE, S.A.

by

ANASTASIO SOMOZA DEBAYLE
President

APPENDIX E

American Institute
Hull War Risks and Strikes Clauses
(Including Automatic Termination and Cancellation Provisions)
For Attachment to American Institute Hull Clauses
December 1, 1977

To be attached to and form a part of Policy No. 01/145005 of the Lloyd's

This insurance, subject to the exclusions set forth herein, covers only those risks which would be covered by the attached Policy (including collision liability) in the absence of the WAR, STRIKES AND RELATED EXCLUSIONS clause contained therein but which are excluded thereby and which risks shall be construed as also including:

1. Any mine, bomb or torpedo not carried as cargo on board the Vessel;

2. Any weapon or war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;

3. Civil war, revolution, rebellion, insurrection, or civil strife arising therefrom;

4. Strikes, lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power;

5. Malicious acts or vandalism to the extent only that such risks are not covered by the attached Policy;

6. Hostilities or warlike operations (whether there be a declaration of war or not) but this paragraph (6) shall not include collision or contact with aircraft, rockets or similar missiles, or with any fixed or floating object, or stranding, heavy weather, fire or explosion unless caused directly by a hostile act by or

against a belligerent power which act is independent of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other vessel involved therein, is performing. As used herein, "power" includes any authority maintaining naval, military or air forces in association with a power.

EXCLUSIONS

This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

a. Any hostile detonation of any weapon described above in paragraph (2):

b. Outbreak of war (whether there be a declaration of war or not) between any of the following countries: United States of America, United Kingdom, France, the Union of Soviet Socialist Republics or the People's Republic of China;

c. Delay or demurrage;

d. Requisition or preemption;

e. Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or impending hostilities;

f. Capture, seizure, arrest, restraint, detainment, or confiscation by the Government of the United States or of the country in which the Vessel is owned or registered.

HELD COVERED AND OTHER PROVISIONS

The held covered clause appearing under the heading ADVENTURE in the attached Policy is deleted and the following clause substituted therefore:—

> "Subject to the provisions of the Automatic Termination and Cancellation Clauses below, held covered in the event of any breach of conditions as to loading or discharging of cargo at sea, or towage or salvage activities provided (a) notice is given to the Underwriters immediately following

receipt of knowledge thereof by the Assured, and (b) any amended terms of cover and any additional premium required by the Underwriters are agreed to by the Assured."

If at the natural expiry time of this insurance the Vessel is at sea, this insurance will be extended, provided previous notice be given to the Underwriters, for an additional premium at a rate to be named by the Underwriters, until midnight Local Time of the day on which the Vessel enters the next port to which she proceeds and for 24 hours thereafter, but in no event shall such extension affect or postpone the operation of the Automatic Termination and Cancellation Clauses below.

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured.

The provisions of the attached Policy with respect to constructive Total Loss shall apply only to claims arising from physical damage to the Vessel.

AUTOMATIC TERMINATION AND CANCELLATION CLAUSES

A. This insurance and any extention thereof, unless sooner terminated by the provisions of section B or C, shall terminate automatically upon and simultaneously with the occurrence of any hostile detonation of any nuclear weapon of war as defined above, wheresoever or whensoever such detonation may occur and whether or not the Vessel may be involved.

B. This insurance and any extension thereof, unless sooner terminated by the provisions of section A or C, shall terminate automatically upon and simultaneously with the outbreak of war, whether there by a declaration of war or not, between any of the following countries: United States of America, United Kingdon, France, the Union of Soviet Socialist Republics or the People's Republic of China.

C. This insurance and any extension thereof, unless sooner terminated by section A or B, shall terminate automatically if and when the Vessel is requisitioned, either for title or use.

D. This insurance and any extension thereof may be cancelled at any time at the Assured's request, or by Underwriters upon 14 days' written notice being given to the Assured, but in no event shall such cancellation affect or postpone the operation of the provisions of sections A, B or C. Written or telegraphic notice sent to the Assured at his (its) last known address shall constitute a complete notice of cancellation and such notice mailed or telegraphed to the said Assured, care of the broker who negotiated this insurance, shall have the same effect as if sent to the said Assured direct. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation shall be 14 days from midnight Local Time of the day on which such notice was mailed or telegraphed as aforesaid. Underwriters agree, however, to reinstate this insurance subject to agreement between Underwriters and the Assured prior to the effective date and hour of such cancellation as to new rate of premium and/or conditions and/or warranties.

RETURNS OF PREMIUM

The RETURNS OF PREMIUM clause of the attached Policy is deleted and the following substituted therefore:—

> "In the event of an automatic termination or cancellation of this insurance under the provisions of sections A, B, C or D above, or if the Vessel be sold pro rata net return of premium will be payable to the Assured, provided always that a Total Loss of the Vessel has not occurred during the currency of this Policy. In no other event shall there by any return of premium."

THIS INSURANCE SHALL NOT BECOME EFFECTIVE IF, PRIOR TO THE INTENDED TIME OF ITS ATTACHMENT, THERE HAS OCCURRED ANY EVENT WHICH WOULD HAVE AUTOMATICALLY TERMINATED THIS INSURANCE UNDER THE PROVISIONS OF SECTIONS A, B, OR C HEREOF HAD THIS INSURANCE ATTACHED PRIOR TO SUCH OCCURRENCE.

APPENDIX F

CONFISCATION OF PROPERTY

Decree No. 3

THE GOVERNMENT JUNTA OF NATIONAL RECONSTRUCTION OF THE REPUBLIC OF NICARAGUA

Making use of its powers,

Renders the following decree:

Article 1. The Attorney General is authorized to immediately proceed with the taking over, requisitioning and confiscation of all assets of the Somoza family, military personnel and officials who have abandoned the country since December 1977;

Once said property has been taken over, requisitioned or confiscated, the Attorney General shall turn over everything that he has done to the competent authorities.

Article 2. The present law shall enter into effect today as from the time of its publication by any means of collective communication, without prejudice to its subsequent publication in the Diario Oficial (Official Gazette).

Managua, July 20, 1979—"Year of National Liberation"

GOVERNMENT JUNTA OF NATIONAL RECONSTRUCTION

Violeta B. de Chamorro – Sergio Ramirez Mercado – Moises Hassan M. – Alfonso Robelo Callejas – Daniel Ortega Saavedra.

APPENDIX G

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 81-7701

OPE SHIPPING, LTD. *et ano.*,
Plaintiffs-Appellants,

–against–

ALLSTATE INSURANCE COMPANY, INC., *et al.*,
Defendants-Appellees.

PLAINTIFFS-APPELLANTS' AFFIDAVIT IN OPPOSITION TO DEFENDANTS-APPELLEES, WAR RISK UNDERWRITERS' MOTION FOR LEAVE TO FILE A RENEWED PETITION FOR REHEARING.

STATE OF NEW YORK)
) SS.:
COUNTRY OF NEW YORK)

VICTOR S. CICHANOWICZ, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice before this Court, and a member of the firm of Cichanowicz & Callan, attorneys for plaintiffs-appellants, OPE SHIPPING, LTD., VADOR SHIPPING, LTD., AGUA SHIPPING, LTD. and DURAS SHIPPING, Ltd., in the above captioned matter. I submit this affidavit in opposition to defendants-appellees WAR RISK UNDERWRITER motion for leave to file a *renewed* petition for rehearing.

2. Plaintiffs-appellants oppose the motion on two grounds. First, neither Fed.R.App.P. 40 nor any other federal rule or statute makes any provision for *renewal* of a petition for rehearing. Second, the argument raised by the WAR RISK Underwriters in their application to renew was also raised by them on pages 3 and 8 of their September 13, 1982 petition for rehearing with suggestion for *in banc* consideration and was rejected by this Court on or about November 5, 1982.

3. It should be noted that the defendants-appellees, WAR RISK UNDERWRITERS, have taken a portion of the Court's August 30, 1982 decision completely out of context. The Court did not say that two of the vessels were detained *by* Panama as the WAR RISK UNDERWRITERS allege in paragraph 2 of their moving affidavit. What the Court said was:

> Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships *detained there*, but without success.

687 F.2d 639, 644 [Emphasis added].

A reading of the decision clearly shows that this Court never found a detention by the Panamanian government within the meaning of the war risk policy exclusions nor, for that matter, did the district court. What this Court did hold is that the loss of the vessels was caused by their prior unlawful taking by the respective crews and not by anything that happened in Panama. See, 687 F.2d 639, 642 *et seq.*"

4. We submit that counsel's persistence in arguing a point so clearly without merit, and one which this Court has already considered and rejected on defendants-appellees' petition for rehearing leads unavoidably to the conclusion that this application is being made in bad faith solely for the purposes of delay.

WHEREFORE, plaintiffs-appellants respectfully request that the motion be denied.

Sworn to before me
on November 30, 1982

VICTOR S. CICHANOWICZ
JOSEPH P. DE MAY, JR.
Notary Public State of New York
No. 41-4698900
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 19___.

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

82-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNDERWRITERS AT LLOYD'S,

Petitioners,

—against—

OPE SHIPPING, LTD., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Summary of Argument

Respondents, OPE SHIPPING, LTD., VADOR SHIPPING, LTD., DURAS SHIPPING, LTD. and AGUA SHIPPING, LTD., respectfully pray that the petition of UNDERWRITERS AT LLOYD'S ("WAR RISK INSURERS") for writ of certiorari to the United States Court of Appeals for the Second Circuit be denied.

The decision below was completely in accord with the applicable law and the petition shows no special or important reasons why the writ should issue. The WAR RISK INSURERS do not show that the court of appeals decision breaks any new ground, raises any questions of constitutional, treaty or statutory interpretation, or that it is in conflict with the law as defined by his Court or by any other forum.

Statement of Facts

This case began as four separate actions which were commenced by private corporations to recover damages under policies of marine and war risk insurance for the loss of four commercial ocean going vessels (the HOPE, the EL SALVADOR, the MANAGUA and the HONDURAS) each having an agreed insured value of $1,000,000.00. The underlying facts are succinctly stated in the court of appeals decision [*App. A, pp. A2-A5*].*

> In June, 1979, the *El Salvador*, the *Hope*, the *Managua* and the *Honduras* were owned respectively by three Panamanian corporations and one Nicaraguan corporation, all apparently under the control of General Anastasio Somoza. The ships were registered under the Nicaraguan

*References in this brief to "App." are to the indicated appendices found at the end of the petition for certiorari.

flag. The four vessels were lost to their owners during the 1979 Nicaraguan revolution which resulted in the overthrow of the Somoza government by Sandinista forces. The chronology of events leading to the demise of the Somoza regime is set forth in the opinion of the court below, reported in 521 F. Supp. at 342.

On June 17, 1979, the *Hope* was taken over by four armed crew members who identified themselves as Sandinistas and ordered the ship's captain to proceed to Cuba. In Puerto Nuevita, Cuba, Cuban authorities came aboard the *Hope* and sailed it to Mariel, Cuba, where it remained until it was returned to Nicaragua.

On June 22, the *El Salvador* was removed from the Canal Zone to Panamanian waters while its captain was ashore. The chief mate stated that five armed crew members, who identified themselves as Sandinistas, ordered the transfer and hoisted the Sandinista flag. The Panamanian Maritime National Guard took control of the ship. The *Honduras* and the *Managua* suffered similar fates around June 22. The *Honduras* was taken from the Canal Zone into Panamanian waters, while the *Managua* slipped out of El Salvador in contravention of orders and also was taken to Panama.

On June 24 and 28, 1979, Somoza informed his longtime business associate Joseph Baittiner about the fate of the ships. At Somoza's request, Baittiner then undertook to transfer title of the ships to Cayman Islands corporations. On July 9, papers were executed for the transfer of the *Hope* from El Porvenir Shipping Co., Inc. to OPE Shipping, Ltd., the *El Salvador* from Cia. de Navegacion La Libertad, S.A., to Vador Shipping, Ltd., the *Honduras* from Marina Mercante Nicaraguense, S.A. to Duras Shipping, Ltd. and the *Managua* from Cia. de Navegacion Corinto, S.A. to Agua Shipping, Ltd.

On or before July 10, the marine risk coverage on the ships was cancelled, either for non-payment of premiums

or because of the change in ownership. On July 11, the war risk insurers authorized the assignment of their policy to the Cayman Islands corporations. On July 13, the vessels were registered under the British flag in the Cayman Islands.

The ships remained in Cuba and Panama until after the Sandinistas gained complete control of the Nicaraguan government. The vessels were returned to Nicaragua in August, 1979, and on September 28, 1979, plaintiffs sued in the court below to recover their insured value.

In the summer of 1980, the Empresa Nacional de Puertos, an agency of the Sandinista government, commenced actions in the First District Court of Managua, Nicaragua, to recover port charges for the four ships which had accrued while they were laid up in Corinto, Nicaragua. The ships were attached pursuant to judicial orders, and, following the entry of judgments, were offered for sale at public auction and purchased by Empresa for the amount of the charges owed.

* * *

At the time the ships were diverted from their courses, the marine risk insurance was in effect. The marine policy covered loss due to barratry of the master and mariners and other like perils, but specifically excluded loss resulting from civil war, revolution, rebellion, insurrection or civil strife arising therefrom, hostilities or warlike operations, whether or not there was a declaration of war.

* * *

[A] war risk policy complemented the marine risk policy by providing coverage for the risks excluded from coverage in the latter policy under the "War, Strike and Related Exclusions" clause.

The court of appeals affirmed the district court's dismissal of the complaints against the MARINE RISK INSURERS, but reversed the dismissal of the complaints against the WAR RISK

INSURERS. In doing so, it rejected, for sound reasons, the arguments now advanced by the WAR RISK INSURERS that they should be relieved of liability because the war risk policy excluded coverage for losses due to "[c]apture, seizure, arrest, restraint, detainment, or confiscation by the Government . . . of the country in which the Vessel[s were] owned or registered." *Id.*

The WAR RISK INSURERS have chosen to treat this lawsuit as one between themselves and General Somoza. However, the contracts of insurance did not insure General Somoza or the government he headed. The lawsuit only involved contracts of marine and war risk insurance which were duly negotiated and paid for by four private corporations and the four vessels which these corporations owned. The WAR RISK INSURERS were obviously fully aware of the political situation in Nicaragua in 1978 and 1979, but wrote and issued the policies in the form sued upon, and they accepted premiums, not from General Somoza, but from the private corporations.

In this regard, the WAR RISK INSURERS make allegations of fact that simply do not square with the record.

On page 3 of their petition, they say:

> The four vessels were irrevocably lost to their owners as of June 17-22, 1979 because neither Cuba nor Panama would return the vessels because of their connection with Somoza.

Neither the district court nor the court of appeals made any such finding. Both courts found that the vessels were lost because they were taken over by their respective crews and that they were taken to Cuba and Panama for safekeeping. *App. A, pp. A2-A5; App. B, pp. A16-A18, A22-A24.* Neither court made any determination of "irrevocability". As explained in Point II of this brief, whatever events may have occurred *after* the vessels were taken cannot in any event defeat the OWNERS' right to recover under the policy.

The WAR RISK INSURERS also state on page 3 of the petition:

> The Sandinistas took complete control of Nicaragua on July 20, 1979 and, on that same day, expropriated the entire business empire of Somoza

Although the district court decision refers to a NEW YORK TIMES report to that effect [*App. B, p. A15, no. 14*], the court of appeals noted that all that was ever shown was that the Nicaraguan Attorney General was given *authority* to take over, requisition and confiscate all assets of the Somoza family. And that the conduct of the Sandinista Government was inconsistent with any such confiscation of the four vessels. *App. A, p. A8; App. F, p. A34.* There was no evidence as to what assets of the Somoza family the Nicaraguan Attorney General did in fact confiscate or when he confiscated them. *Id.* On the other hand the evidence conclusively established that the Sandinista Government brought suits against the Cayman Island respondents as owners of the vessels for port charges and became owner as the result of purchase of a judicial sale [*App. A, pp. A3, A7-A8*].

ARGUMENT

I.

The Court of Appeals' review was proper.

A. The Clearly Erroneous Rule.

The WAR RISK INSURERS contend that the court of appeals violated the Clearly Erroneous Rule because it overruled or ignored the district court's findings that the transfers of the vessels were shams. *Petition, p. 9.* However, the court of appeals overruled the district court *on the law*, holding that the INSURERS lacked standing to inquire into the transfers. *See, App. A, pp. A6-A7.*

B. Piercing the Corporate Veil.

Citing *Kirno Hill Corp.* v. *Holt*, 618 F. 2d 982, 985 (2d Cir. 1980), the WAR RISK INSURERS contend that the district court's piercing of the corporate veil to place ownership of the vessels in General Somoza, personally, could have been justified on the basis that General Somoza completely dominated the former Panamanian and Nicaraguan corporate vessel owners. This contention is not borne out by the law or by the evidence. The portion of the *Kirno Hill* decision relied upon by the WAR RISK INSURERS and cited on page 10 of their petition states:

> The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: [the individual] must have used [the corporation] to perpetrate a fraud or have so dominated and disregarded [the] corporate form that [the corporation] primarily transacted [the individual's] personal business rather than its own corporate business. [Citations omitted].

There was no evidence adduced at trial or mentioned in the district court decision [*App. B, pp. A10-A25*], and none is cited by the WAR RISK INSURERS, to show that the corporate forms of the Panamanian and Nicaraguan companies which formerly owned the vessels were ever "dominated" or "disregarded" by General Somoza, or that he ever used those companies to transact his own personal business.

THE WAR RISK INSURERS go on to argue that piercing the corporate veil could also have been justified on the ground of fraud since the transfers of the vessels occurred after they had been lost so that there was supposedly no title or registry to transfer, and the request by the corporate owners to the WAR RISK INSURERS to endorse the transfer of vessel ownership onto the war risk policy constituted a misrepresentation or concealment of material fact sufficient to constitute a fraud. *Petition, pp. 10-11.* This argument is also unwarranted for several reasons

and is nothing more than a belated attempt to raise an issue which never existed in the case from its very inception.

The WAR RISK INSURERS first attempted to create a question of fraudulent concealment and misrepresentation in their petition for rehearing to the court of appeals. It was not pleaded in their answers as required by Fed.R.Civ.P. 9(b) nor was it raised in the district court or argued to the Second Circuit on appeal. (Neither lower court decision makes any reference to the point. *See, Appendices A and B*).

Second, there appears to be no authority for the proposition that the lawful owner of property can be divested of title by one who wrongfully takes it from him. As explained in Point III below, the one case cited by the WAR RISK INSURERS purportedly in support of their position is in fact authority for precisely the opposite. Even if we were to accept the WAR RISK INSURERS' contention that the vessels were confiscated by the Sandinista government (which they were not), the confiscation decree on which they rely was not issued until eleven days *after* the July 9, 1979 transactions. *See, App. F, p. A34.*

Third, the authorities cited by the court of appeals. [*App. A, p. A6*] show that there must be some causal connection between the use of the corporate form and the fraud alleged to have been perpetrated. The WAR RISK INSURERS do not allege any fraud caused by use of the corporate form.[1]

C. Scope of the Review.

The WAR RISK INSURERS argue that the court of appeals limited its review to confiscation and refused to test the other excepted clauses in the war risk policy (capture, seizure, deten-

[1]To put the matter in proper perspective, one need only imagine how the WAR RISK INSURERS would have reacted had General Somoza brought suit in his own name to recover under the policy issued to a Nicaraguan and three Panamanian corporations.

tion, etc.) against its own findings of fact that the vessels were commandeered, seized and detained. *Petition, pp. 11-12.* The argument simply does not square with the record. The court of appeals *did* consider the other excepted causes and found that both as a matter of law and fact they were *not* the proximate cause of the vessels' loss. *See, App. A, pp. A5-A9.*

II.

This case does not raise any issues of overriding importance to the Marine Insurance Community.

The WAR RISK INSURERS argue that the court of appeals decision directly conflicts with *Standard Oil* v. *United States,* 267 U.S. 76, 45 S.Ct. 211, 69 L.Ed. 519 (1925). The court of appeals decision not only does not conflict with that decision but is in complete accord with it.

Standard Oil arose out of the loss of the SS LLAMA which was boarded at sea by naval officers of a foreign power (Britain) and diverted via Kirkwall for examination. On its way, it struck a rock and was totally lost. The issue addressed by the Supreme Court was whether the loss of the vessel was covered by the marine risk policy which covered perils of the sea such as striking a rock, or by the war risk policy which covered:

> [T]akings at sea, arrest, restraints and detainments of all kings, princes and peoples, of what nation, condition or quality soever, and all consequences of hostilities or war like operations, whether before or after declaration of war.
>
> 267 U.S. at 77.
> 69 L.Ed. at 520.

In holding the war risk insurer liable for the loss, the *Standard Oil* Court held:

> [T]hat the vessel and her cargo were seized, arrested, and detained within the meaning of the [war risk] policy we think too plain to require much more than mention.
>
> 267 U.S. at 78, 69 L.Ed. at 521

and that:

> [I]f a vessel should be taken from an owner's hands without his consent, and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond and attribute the loss to a peril of the sea. *Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a nonconductor between the insured and subsequent events.* [Emphasis added].
>
> 267 U.S. at 77-78.
> 69 L.Ed. at 520-21.

Allegedly on the *Standard Oil* decision, WAR RISK INSURERS argue that since the SS LLAMA was held to have been seized, arrested and detained within the meaning of the *Standard Oil* perils clause, then the four vessels must also be held to have been seized, arrested and detained within the meaning of their exclusionary clause. However, the two takings were different. The SS LLAMA of *Standard Oil* was taken by naval officers of a foreign power, which falls within the classic definition of capture and seizure. See, Mullins, MARINE INSURANCE DIGEST, pp. 30-31 [Cornell Maritime Press, Cambridge Maryland, 1959]. The four vessels in this case were taken over by their respective crews which both the court of appeals and the district court found fell within the classic definition of barratry. *App. A, pp. A2-A5; App. B, pp. A16-A18, A22.* Neither the district court nor the court of appeals found that the ships were ever detained by Cuba or Panama. The finding of the district court, which was not disturbed by the court of appeals, was that the ships were delivered to Panama and Cuba by their crews for "safekeeping". *App. B, p. A24.* Thus there not only was no capture, seizure, arrest, re-

straint or detainment, but under *Standard Oil* they could not be the proximate efficient cause of the loss.

Petitioners' attempt under these circumstances to construe *Standard Oil* into controlling authority in this case, while novel, is unknown to Anglo-American jurisprudence. Merely substituting the name of Sandinistas for the British navy does not bring this case within the exclusionary language of petitioners' War Risk Clauses. In the absence of a change in the factual pattern the proximate efficient cause of the loss in this case still remains the barratrous conduct of the crews in taking over control of the vessels as found below and not capture, seizure, arrest, restraint or detainment which occurred in *Standard Oil* but in fact were not found to have occurred in the case at bar.

What the WAR RISK INSURERS are really doing in their petition is taking ordinary descriptive words from the court of appeals decision out of context and attempting to convert them into findings of excluded events within the meaning of the war risk policy exclusions. A fair reading of the court of appeals decision shows that that court never found that the loss of the vessels was proximately caused by capture, seizure or detainment, etc. within the meaning of the policy or by anything that happened in Cuba or Panama after the vessels had already been lost to their owners. This same observation was made by respondents in an affidavit [*App. G, pp. A35-A36*] submitted to the court of appeals in opposition to the WAR RISK INSURERS' application for leave to file a renewed petition for rehearing. The court of appeals obviously understood the context in which it had used these words and therefore denied the WAR RISK INSURERS' application. WAR RISK INSURERS characterization of respondents' affidavit as an attack on the court of appeals decision is just another example of their attempt to create a case for the purpose of obtaining review on issues which do not exist. for the purpose of obtaining review on issues which do not exist

If the marine insurance community genuinely fears that the language of the exclusionary clause of the war risk policy is

ambiguous, it has only to change that language to precisely reflect the events they wish excluded.

III.

This case does not involve conflicting Government rights.

The WAR RISK INSURERS contend that this case raises a question of conflicting de jure and de facto government rights. That is not so. This case involves nothing more than contractual claims by private corporate vessel owners and their assignees to recover under policies of marine and war risk insurance issued by various underwriters for the loss of four commercial ocean going vessels. The Sandinista Government made no claim to the vessels by virtue of any governmental power or authority by public acts or otherwise. Instead it recognized the private ownership of the vessels and brought proceedings in its own courts to recover port charges and then became owner of the vessels only as the result of purchasing them at a judicial sale.

Thus, it is hard to see how the WAR RISK INSURERS can argue that the court of appeals violated the act of state doctrine. That doctrine simple precludes the courts of this country from inquiring into the validity of public acts of a recognized sovereign power committed within its own territory. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 400, 84 S.Ct. 923, 11 L.Ed. 2d 804, 808 (1964). The court of appeals did not inquire into the validity of any Sandinista governmental confiscation of the vessels. It simply inquired whether any such confiscation ever took place and found that it had not:

> The Sandinista government commenced actions in 1980 against the Cayman Island corporations as owners of the four vessels to recover port charges accrued by the ships

> after they were returned to Nicaragua. Defendants' expert witness, Dr. Ortega, testified that, at the conclusion of those proceedings, the Nicaraguan government "became" the owner of the ships. The bringing of those actions and the sales of the ships to the Sandinista government belie the insurers' assertions that the Nicaraguan government had confiscated the ships in 1979.
>
> *App. A, pp. A7-A8.*

The court of appeals was correct when it noted that the confiscation authorization decree relied upon by the WAR RISK INSURERS [*App. F, p. A34*] merely provides that the Nicaraguan attorney general should *proceed with* the taking over, requisitioning and confiscation of all assets of the *Somoza family*. That decree says nothing more. By its own terms, it does not purport to confiscate anything. It does not identify or refer to any of the vessels or the vessels' corporate owners or assignees. Furthermore there was no evidence at trial, and none is cited by the WAR RISK INSURERS, to indicate that the Sandinista government ever considered the vessels to have been confiscated or that it even considered the vessels to be assets of the Somoza family within the meaning of the decree. In fact, its conduct clearly was the contrary.

The WAR RISK INSURERS also argue that under the rules of international warfare, the Sandinista government *retroactively* became the owner of the ships when, after the confiscation authorization decree [*App. F, p. A34*] had been issued, the ships returned to Nicaragua. *Petition, p. 18.* However, as the Court of Appeals noted, if the Sandinista government had retroactively become the owner of the four vessels, it would hardly have been necessary for it to purchase the ships at a judicial sale which took place one year after the vessels returned to Nicaragua. *App. A, pp. A7-A8.*

It is difficult to understand in what way *Civil Air Transport Incorporated* v. *Central Air Transport Corporation,* (1953) A.C.

70, 2 Lloyds' Reg. 209 (Privy Council) supports the WAR RISK INSURERS or is authority for the district court decision. That case deals with the validity of title passed by a sale of aircraft rather than liability under an insurance policy and it is distinguishable because the owner and transferor of the aircraft was the deposed Nationalist government of China. The ships in this case were *privately* owned,[2] and nothing in the *Civil Transport* decision extends the "accepted rules of international warfare" (*Petition, p. 18*) regarding acquisition of title to state assets to property that is privately owned.

If *Civil Transport* is authority for this case, it does not support WAR RISK INSURERS' position. It held that the sale of the aircraft *did* convey good title and that the doctrine of retroactivity was inapplicable to property, the possession of which was wrongfully obtained. A.C. at 94-95. The Privy Council held that the validity of the sale "must be judged as at the date when it was entered into, and not in the light of subsequent events". A.C. at 91. The sale was not a "device" for "alien and improper purposes" even if its motive was to secure that the aircraft should not fall into Communist hands. A.C. 91-92.

---

[2]The position of both the district court and the WAR RISK INSURERS is that the ships were owned by Anastasio Somoza, personally, rather than by any of the corporations. *See, e.g., Petition, pp. 9-11; App. B, pp. A11.* No one has yet claimed that the ships were owned by the government General Somoza headed.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1173

IN THE

Supreme Court of the United States

October Term 1982

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

OPE SHIPPING, LTD., and EL PORVENIR SHIPPING COMPANY, INC., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

VADOR SHIPPING, LTD., and CIA DE NAVEGACION LA LIBERTAD, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

AGUA SHIPPING, LTD., and CIA DE NAVEGACION CORINTO, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

-against-

DURAS SHIPPING, LTD., and MARINO MERCANTE NICARAGUENSE, S.A., et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The very arguments submitted by the respondents' Brief in Opposition hereto completely prove the clear and present mandate to this Court that a Writ of Certiorari must be granted to untangle the tangled web woven below.

From the outset, respondents realized that the only possible way to vindicate the Second Circuit was to deny that the Court said what it did say; and, at the same time, to endeavor to keep a safe corporate distance between General Somoza and all the owning corporations of the vessels in suit. Respondents also had to ignore Cuba and Panama for purposes of confiscation and detention, which proved to be an impossible task in view of the factual record contained in the opinion sought to be reviewed.

SOMOZA AND THE VESSELS

On pages 4 and 6 of the Opposing Brief, respondents deny that Somoza was the real party in interest with respect to the vessels, and further deny that he dominated or used the owning corporations for his own purposes. The District Court found as a fact that the vessels belonged to Somoza (App. A p.A-11), and even the Second Circuit begrudgingly found that the corporations were "all apparently under the control of General Anastasio Somoza (App. A. p.A-2). However the Second Circuit did not attempt to reach the issue of corporate "domination" because it had already violated its own maritime standard for corporate veil piercing as more thoroughly discussed in our Petition (p.9-10).

Nevertheless what clearer evidence could be found to prove complete domination and control by Somoza over the vessels, over the owning corporations, and over the insurance policies in suit, than as set forth in Somoza's letters to Mr. Baittiner (App. A p.A-28, A-29)? In fact, the very tone of language used by Somoza only tends to ridicule the subsequent language of the Second Circuit in rejecting the findings of sham by the District Court with respect to contractual consideration or payment i.e. "Where, as here, the parties to a conveyance are satisfied with their bargain***" (App. A p.A-7). How could any

responsible tribunal reading that language in 1982 fail to conclude that, during the material times in question, *there could be only one party to that conveyance, i.e. Somoza trying to protect his assets.*

PANAMA AND CUBA

The Second Circuit found as facts that the HOPE was taken by the crew on June 17, 1979 to Puerto Nuevita, Cuba where it was boarded by the Cuban National Guard, who sailed it to Mariel, Cuba; and that the EL SALVADOR, HONDURAS, and MANAGUA, were taken by the crews to Panama on or about June 22, 1979 where the Panamanian Maritime National Guard took control of the vessels (App. A p.A-3, A-4). The Second Circuit also found as fact that the ships could not have been recovered from Cuba and Panama because of the ships' connection with Somoza (App. A p.A-9). Despite this clear language to the contrary, plaintiffs nevertheless argue at page 4 of the Opposing Brief that "Neither the district court, nor the court of appeals made any such finding".

Respondents' argument on this point becomes even more blatantly erroneous when viewed against the fact that the Second Circuit based its finding on the testimony of Mr. Renaldy Guttierrez, who testified at trial as the President of the Cayman Island Corporations, wherein he succeeded the late Mr. Baittiner. That same testimony of Mr. Guttierrez also convinced the Second Circuit to conclude for sue and labor purposes that "Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships detained there, but without success". (App.A p.A-9). Even though the finding was made by the Second Circuit in rejecting the sue and labor argument never raised by petitioners at trial or on appeal, respondents now argue in opposition herein that the Second Circuit did not say that the vessels "detained" in Panama were "detained" by Panama.

The Second Circuit not only held that the vessels were "detained" by Panama as of June 22, 1979 (App.A p.A-9) but it also held that two of the vessels "detained" were owned by Panamanian corporations as of June 22, 1979, with the alleged transfers of title not being effective until July 9, 1979 (App.A p.A-3). Having overruled the District Court on the legitimacy of the entire transfer transaction, the Second Circuit went on to hold

that Nicaragua was not the country of ownership or registry for purposes of confiscation or detainment under the War Risk Clauses because the Cayman Islands was the country of ownership as of July 9, 1979, and the country of registry as of July 13, 1979 (App.A p.A-6). Therefore by disregarding all the credible evidence before the District Court to the contrary, the Second Circuit found a valid transfer of title on July 9, 1979 from Somoza-Nicaragua to Somoza-Cayman Islands but conveniently overlooked its earlier finding that Panama was the country of ownership when the EL SALVADOR and MANAGUA were detained by Panama on or about June 22, 1979.

As of June 22, 1979, the EL SALVADOR and MANAGUA were owned by Panamanian corporations but were being "detained" by the Government of Panama, whom the Second Circuit held was not going to return the vessels, neither to Somoza nor to the Panamanian corporations, because Panama had no sovereign scruples about piercing the corporate veils of corporations existing by virtue of Panamanian laws. Despite repeated rehearing requests, the Second Circuit refused to recognize, nevermind repudiate, the ambiguities in its own appellate language with respect to the EL SALVADOR and MANAGUA because that also would have entailed a complete review of its obvious erroneous reasoning throughout. Small wonder that respondents at page 10 of the Opposing Brief, had to try and distinguish the ambiguous appellate language between "ordinary descriptive words" as opposed to "findings of excluded events within the meaning of the War Risk policy exclusions", which was the very burden assumed by the Second Circuit when limiting its appellate review to one excluded event rather than testing its own findings of fact against each of the excluded events.

CONFISCATION AND DETENTION.

In point of fact, the Second Circuit's failure to test its findings that the vessels were "detained" by Panama against each of the excluded events completely erodes the validity of its contrived conclusion that the vessels were not "confiscated" by Nicaragua without applying its own test of retroactive validation. The barreness of its appellate review is further evidenced by respondents' apology that the Court merely was using ordinary descriptive words which, unfortunately, also happened to be

used in the exclusionary language supposedly under review. Therefore, according to respondents' misinterpretation, the Second Circuit not only held that Nicaragua did not "confiscate" the vessels but also held that Panama did not "detain" them, which is a sad commentary not only on the lack of lucidity in judicial language but, more particularly with respect to the certain inefficacy of that judicial language for future precedential purposes.

The sad fact remains that, because it distorted "ordinary descriptive words" far beyond their common sense meaning, the Second Circuit arrived at a completely meaningless conclusion. The ordinary descriptive meaning of confiscation is the taking of property without compensation, and the vessels were taken from Somoza and/or the owning corporations as of June 17th and 22nd, 1979 without compensation or any hope thereof; and eventually were sold by Nicaragua to offset unpaid accrued port charges which, in some circles, could be considered as a bit of subtle irony, i.e. "come home Somoza, and we'll give you back the ships!". To hold that the vessels were not taken from Somoza without compensation by Nicaragua because the Attorney General did not issue a Confiscation Order pursuant to a Decree that did not require it, is completely and patently absurd.

In summary, the reasoning of the Second Circuit with respect to the War Risk exclusionary language was completely erroneous because, for better or for worse, Somoza could not be divorced from the vessels; Cuba and Panama could not be divorced from the Sandinistas; and confiscation could not be divorced from capture, seizure, arrest, or detainment. The American War Risk Clauses were entitled to, but did not receive a well reasoned judicial interpretation of that exclusionary language for continued use in international commerce. The appellate failure below now can be rectified only by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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